Supreme Court, U.S.
FILED

04 24 JUN 30 2004

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ARTHUR JONES, Chief,

Petitioner,

v.

OCTAVIO DELGADO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

GRANT F. LANGLEY
City Attorney
RUDOLPH M. KONRAD
Deputy City Attorney
JAN A. SMOKOWICZ
Assistant City Attorney
Counsel of Record
OFFICE OF THE MILWAUKEE CITY ATTORNEY
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
(414) 286-2601

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether a First Amendment license exists for speech that is part of a public employee's official duties?

Whether it is sufficient in denying qualified immunity for the Seventh Circuit to say that it has long been established that a public employer cannot violate First Amendment rights of its employees, or whether instead courts must look to controlling precedent involving similar factual situations in undertaking this second step in the qualified immunity analysis of a First Amendment claim?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE BASIS FOR JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE	1
STATEMENT OF THE CASE	2
ARGUMENT	7
I. THE LOWER COURTS NEED THE GUIDANCE OF THIS COURT ON THE LIMIT OF FIRST AMENDMENT PROTECTION FOR SPEECH THAT IS PART OF A PUBLIC EMPLOYEE'S OFFICIAL DUTIES	7
II. THE COURT SHOULD PROVIDE GUIDANCE ON WHETHER QUALIFIED IMMUNITY CAN BE DENIED, AS IT WAS IN THIS CASE, ON THE BASIS OF A GENERAL STATEMENT THAT A PUBLIC EMPLOYER CANNOT VIOLATE THE FIRST AMENDMENT RIGHTS OF ITS EMPLOYEES OR WHETHER LOWER COURTS MUST LOOK TO CONTROLLING PRECEDENT BASED ON SIMILAR FACTUAL SITUATIONS	17

TABLE OF AUTHORITIES

Page

CASES

Branton v. City of Dallas, 272 F.3d 730 (5th Cir. 2001) 12

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004)..... 15, 16

Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001)..... 14

Connick v. Myers, 461 U.S. 138 (1983) 8, 9, 14, 16

Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002).....*passim*

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998) 21, 22, 23

Dirrane v. Brookline Police Dept., 315 F.3d 65 (1st Cir. 2002) 20, 21, 23, 26

Gonzalez v. City of Chicago, 239 F.3d 939 (7th Cir. 2001) .....*passim*

Gustafson v. Jones, 117 F.3d 1015 (7th Cir. 1997)..... 18

Hope v. Pelzer, 536 U.S. 730 (2002)..... 27

Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) 25, 26, 27

Medina v. City and County of Denver, 960 F.2d 1493 (10th Cir. 1992)..... 22

Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998) 11, 12, 19, 20, 24

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 8, 17, 25, 26

Rivera-Jimenez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004) 27, 28

Roth v. Veteran's Admin. of United States, 856 F.2d 1401 (9th Cir. 1988)..... 15

TABLE OF AUTHORITIES – Continued

Page

Saucier v. Katz, 533 U.S. 194 (2001) ..... *passim*

Spiegla v. Hull, ___ F.3d ___, 2004 WL 1301857 (7th Cir. 2004) 10

Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000) 23, 24, 26

Suboh v. Dist. Attorney's Office, 298 F.3d 81 (1st Cir. 2002) 28

Taylor v. Keith, 338 F.3d 639 (6th Cir. 2003) 13, 14

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992) 13, 14

Torres-Rosado v. Rotger-Sabat, 335 F.3d 1 (1st Cir. 2003) 28

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

42 U.S.C. § 1983 2

U.S. Constitution, Amend. I ..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is an unreported order, *Octavio Delgado v. Arthur Jones, Chief*, No. 03-3408, and is reproduced in the appendix to this petition. An earlier opinion of the United States Court of Appeals for the Seventh Circuit in this case, addressing the same issues raised in the subsequent order and in this petition, is reported at *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002); it is also reproduced in the appendix to this petition. The opinion of the United States District Court for the Eastern District of Wisconsin is reported at *Delgado v. Jones*, 277 F. Supp. 2d 956 (E.D. Wis. 2003) and is also reproduced in the appendix to this petition.

STATEMENT OF THE BASIS FOR JURISDICTION

The Court of Appeals for the Seventh Judicial Circuit entered its Order on April 1, 2004. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is a case in which a public employee (a police officer) claims that his ultimate supervisor (the City of Milwaukee's police chief at the time) violated his First Amendment rights by transferring him after the officer wrote an internal memorandum as part of a police investigation.

Respondent Octavio Delgado, plaintiff below, has held the position of detective in the Milwaukee Police Department since 1994. Pet. App. 22. In 1998, he was assigned as a detective to the Vice Control Division as an undercover

narcotics investigator. *Id.* In March 2000, a citizen complained to the mayor's office about drug activity at a house located in the City. *Id.* The mayor's office forwarded this complaint to the police department, which promptly investigated it. *Id.* In April 2000, Delgado was part of a drug entry team that searched the complained-of house pursuant to a warrant. *Id.* The police officers arrested several people, including a woman named Margaret Mullins. *Id.* at 33. Delgado interrogated Mullins. In his interrogation, Delgado revealed to Mullins that police knew of her house through the mayor's office. *Id.*

Mullins subsequently sent a letter to Delgado. *Id.* at 22. In this correspondence, Mullins asserted that she knew of a close relative of a public official who patronized a drug house and who claimed to be friends with Arthur Jones, then the City of Milwaukee's police chief. *Id.*

Delgado showed the letter from Mullins to his lieutenant. *Id.* at 23. He took this step consistent with his duties and the Department's rules setting forth the obligations of its officers to report allegations of crime. *Id.* at 31. Delgado, however, asserts that he took this step out of a belief that the allegations had to be investigated and that the matter should be referred outside the department in order to effect such an investigation. *Id.* at 22. Yet as Delgado has testified, "[o]nce [he] gave [the Mullins' letter] to [the lieutenant], if he kept it, it went up the chain of command or to an outside agency, [Delgado] would keep quiet regarding the information and say no more, and [he] would hope that it would be investigated." *Id.* at 40.

Primarily as a joke, but also based upon belief in the department that officers involved in investigations relating to Jones or his command staff were frequently transferred,

the lieutenant asked Delgado what district he wanted to be transferred to. *Id.* at 23. Following the remark, the lieutenant instructed Delgado to make a copy of the letter so that the lieutenant could show it to the captain commanding the unit. *Id.*

Subsequently pursuant to a directive by the captain, the lieutenant ordered Delgado to interview Mullins and to write a report about that interview. *Id.* According to Delgado, he was ordered "specifically to ask questions [of Mullins] regarding Chief Jones and any illegal activity and to explain the letter, to debrief, if you will, Ms. Mullins." *Id.* at 39.

Delgado did this only because he was ordered to do so. *Id.* Delgado admitted that he would not have interviewed Mullins but for the captain's order. *Id.* at 40.

Pursuant to the order, Delgado questioned Mullins. *Id.* at 23. He then prepared a report, known in the department as a "Matter Of," as a result of that interview. *Id.*

Through the interview of Ms. Mullins, Delgado learned that it was the spouse of an alderperson to whom Mullins had referred in her letter. *Id.* Delgado's interview did not produce any evidence of any wrongdoing by the alderperson or Chief Jones.

Delgado turned in his "Matter Of" to his lieutenant. *Id.* The lieutenant, in turn, provided it to the captain. *Id.* On May 18, 2000, the captain handed the report and his written recommendation that the matter be referred to an outside agency for further investigation to Deputy Chief Monica Ray. *Id.* at 23-24. Ray reviewed the material and

expressed her disagreement with the recommendation to refer the matter to an outside agency.

On that same day, Deputy Chief Ray brought the letter from Mullins and the "Matter Of" from Detective Delgado to the attention of Chief Jones. *Id.* at 24. Shortly afterwards, the chief summoned the captain to his office and, according to the captain, angrily confronted him about the matter. *Id.* Jones told the captain that he was not authorized to refer an investigation to an outside agency, and that he should have forwarded the information to Jones sooner. *Id.* Jones heatedly asserted that his authority was being undermined. *Id.* Jones then instructed the captain that he should not speak to Delgado about this matter further and that Delgado would be transferred. *Id.*

On the following day, May 19, Chief Jones signed an order transferring Delgado retroactive to May 18. *Id.* Jones insists that he transferred Delgado because of the detective's disclosure during his questioning of Mullins that the mayor's office was the source of the complaint. *Id.* at 33. Following his transfer to the new assignment, Delgado lost certain vacation days that had been granted to him while at the Vice Control Division. *Id.* at 24.

On May 22, 2000, and pursuant to the directive of Chief Jones, Deputy Chief Monica Ray assigned Milwaukee Police Detective Marilyn Francis to investigate the drug activity of the alderperson's spouse. *Id.* at 43-45. As a direct result of that investigation, on October 5, 2000, the spouse was arrested on a charge of delivery of a controlled substance. *Id.* at 46.

Delgado filed his complaint in the United States District Court for the Eastern District of Wisconsin on

June 29, 2000. His action originally was lodged against Arthur Jones, Deputy Chief Ray, and the City of Milwaukee. The district court had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

On October 17, 2000, defendants filed a motion for dismissal on the pleadings. Following briefing of that motion, the district court entered a decision and order on February 13, 2001, which denied the motion. Pet. App. 7. The motion was based in part on the assertion of qualified immunity on the part of Jones and Ray. *Id.* The two individual defendants (Jones and Ray) filed a notice of appeal from the district court's decision on qualified immunity on February 21, 2001.

In an opinion dated March 8, 2002, the Court of Appeals for the Seventh Circuit affirmed the district court's qualified immunity decision presented on Delgado's pleadings. *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002) ("*Delgado I*"). (Pet. App. 4-20.) Following denial of a motion for rehearing and rehearing *en banc*, the matter was returned to the district court for further proceedings.

At the conclusion of discovery in this matter, the parties, through their attorneys, stipulated to the dismissal of Deputy Chief Monica Ray as a defendant. *Id.* at 21. Meanwhile, on February 28, 2003, the remaining defendants Arthur Jones and City of Milwaukee filed a motion for summary judgment. Following the briefing of that motion, the district court entered a decision and order on August 11, 2003 denying summary judgment to both of the remaining defendants. *Id.* at 21-37. As a part of this decision and order, the district court concluded that Jones was not entitled to summary judgment based upon qualified immunity. *Id.* at 35-36.

On September 10, 2003, Jones filed a notice of appeal from that portion of the district court's decision and order denying him qualified immunity. On April 1, 2004, the Court of Appeals for the Seventh Circuit issued an Order affirming the district court's denial of summary judgment. *Id.* at 1-3.

ARGUMENT

I. THE LOWER COURTS NEED THE GUIDANCE OF THIS COURT ON THE LIMIT OF FIRST AMENDMENT PROTECTION FOR SPEECH THAT IS PART OF A PUBLIC EMPLOYEE'S OFFICIAL DUTIES.

In determining whether qualified immunity should be extended to the individual defendants in this case, the Seventh Circuit, in accord with this Court's directive in *Saucier v. Katz*, 533 U.S. 194 (2001), first had to address whether the First Amendment applied to Delgado's speech. The Seventh Circuit decided that the First Amendment did indeed apply to Delgado's speech. And its decision on this issue has added to the fabric of inconsistent opinions addressing the limits of First Amendment protection for public employees who are duty-bound to speak on a particular subject in the course of their official duties.

Within the particular context of law enforcement, lower courts have had a number of opportunities to address the interplay of speech and job duties, apparently because law enforcement officers will, at times, encounter evidence or allegations of official wrongdoing and are bound by their obligations as officers to report or investigate such matters. As a result, lower courts have and will

face on a recurring basis the problem of locating the appropriate boundaries of the protections of the First Amendment while protecting a significant interest in the proper and efficient operation of governmental agencies.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court established that public employees do not give up their First Amendment right to speak on matters of public interest simply because of their public employment. Pickering, a teacher, had written a letter to a newspaper editor criticizing the manner in which the local school board and superintendent had handled proposals to raise new school revenue. *Id.*, 391 U.S. at 565-6.

However, this Court also acknowledged that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.*, 391 U.S. at 568. As recognized by this Court, "[t]he problem in any case is to arrive at a balance between the interests of the teacher, *as a citizen*, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (emphasis supplied).

Pickering's correspondence was not the product of some explicit or unwritten set of expectations related to his duties as a school teacher. Nor in *Connick v. Myers*, 461 U.S. 138 (1983), when this Court addressed the First Amendment speech rights of a public employee, was the employee bound by the duties of her position to speak. In *Connick*, after being confronted with an undesired transfer, Assistant District Attorney Myers circulated a survey within the office addressing various issues concerning the

office's operation, one of which a majority of this Court deemed to be a matter of "public concern." *Id.* at 140-141, 149. In passing on Myers' claim, this Court explained that:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

Id. at 143 (footnotes omitted). Significant disharmony exists in the courts of appeals' subsequent various interpretations of the limits of the First Amendment protection for statements made by a public employee "as a citizen."

To demonstrate this problem, it is appropriate to begin with the Court of Appeal's analysis of the issue in this case.[1] In *Delgado I*, the Seventh Circuit concluded that the detective's speech was protected by the First Amendment. As a first step in doing so, it reiterated earlier language

---

[1] In affirming the district court's refusal to grant summary judgment, the Seventh Circuit stated that it had "already essentially discussed and decided in our earlier opinion the issues which have been raised here." Pet. App. 2. That earlier opinion came, of course, on appeal from the denial of the individual defendants' motion for judgment on the pleadings. Pet. App. 7. In the subsequent appeal of the denial of summary judgment, the appellate court concluded that discovery had not provided any "new evidence or argument [that] would alter the holding of our earlier opinion in *Delgado I* as applied to this summary judgment." Pet. App. 3. The Seventh Circuit's conclusion, therefore, makes the analysis of its earlier decision at the dismissal stage the proper focus of this petition.

that has the potential for sweeping into the First Amendment virtually all that police officers say in the course of their official duties: "this court has determined that police protection and public safety are generally a matter of public concern." *Delgado*, 282 F.3d at 517 (App. 12).

The Seventh Circuit continued its journey on the back of an analysis that distinguishes "routine" speech that is a part of a police officer's duties from the speech in this case that the court categorized as "certainly not routine." *Id.*, 282 F.3d at 521 (Pet. App. 19). It deemed the speech at issue to fall within this latter category because of the nature of the allegations and the fact that they involved the chief of police *in spite of the fact that Delgado was a detective charged with investigating and reporting on illegal drug activity and conduct related to such activity*. *Delgado*, 282 F.3d at 518-20 (Pet. App. 14-17).[2] But nowhere in this Court's jurisprudence is there any line drawn between "routine" speech and speech about a particular subject that arises infrequently.

The *Delgado* court was driven to this analysis by an attempt to fit its decision alongside the circuit's earlier decision in *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001). In that case, at the pleadings stage, the court affirmed the dismissal of a claim by a fired Chicago police

---

[2] The Seventh Circuit recently reaffirmed its position on this issue in *Spiegla v. Hull*, ___ F.3d ___, 2004 WL 1301857 (7th Cir. 2004). "While Spiegla's actions [of questioning search policy and co-workers' suspicious activities] may have been consistent with her general duty as a correctional officer to keep the facility secure, they were not part and parcel of her core functions [of implementing prison security]." *Id.*, ___ F.3d ___, 2004 WL 1301857,*7.

officer that he had suffered a retaliatory discharge for his prior work as a civilian investigator in the department's Office of Professional Standards. *Id.* at 940. In that role he had investigated and reported on allegations of police misconduct. *Id.* As the basis for its dismissal, the court declared that: "[s]peech which is made in all respects as part of the employee's job duties is generally not the protected expression of the public employee." *Id.* at 942.

It is simply not possible to say, however, that the other courts of appeal have drawn this same line between routine speech (i.e., "speech which is made in all respects as part of the employee's job duties") and speech that escapes this category (and thus receives constitutional protection) based on facts such as the infrequency of the speech's referring to a particular actor (such as the police chief). Thus, it is hard to reconcile the *Gonzalez-Delgado* distinction with another case actually considered by *Delgado* (but only in the second step of qualified-immunity analysis). That case, *Morris v. Crow,* 142 F.3d 1379 (11th Cir. 1998), resulted in a holding that a police officer's traffic report and civil-lawsuit deposition testimony concerning a fellow officer's improper conduct in a high-speed chase did not constitute protected speech. *Id.* at 1383. The *Delgado* court distinguished *Morris* based on the *Morris* court's description of the officer's traffic report as having been made "in the normal course of his duties as an accident investigator." *Morris* at 1382. That distinction conflates two related concepts: routine duties and routine subjects of those duties. There is no indication that the plaintiff officer in *Morris* prepared reports or provided deposition testimony on traffic accidents involving police officers exclusively, much less daily, in his job or that the rank of the fellow officer was significant. His duties as a law

enforcement officer are quite different from the "routine" reporting of Gonzalez on police misconduct. Applying *Morris* to the present case, filing reports on alleged drug activity, and efforts by people to conceal or protect such activity, was without doubt a part of vice control detective Delgado's "normal course" of duties. The different outcome in the two cases simply cannot be justified on the basis of the Seventh Circuit's stated distinction.

There are other cases that show even less certainty on where to draw the line. In a case cited by the district court in this case, the Fifth Circuit in *Branton v. City of Dallas*, 272 F.3d 730 (5th Cir. 2001), determined that an internal affairs investigator's statement to a hearing officer that another officer witness had probably lied in the course of a hearing was protected speech:

> Although Branton's speech occurred at work, because her job required her to report false testimony at official hearings, Branton had not only an invitation but a duty to speak. Thus, "the context factor [set forth in *Connick*] weighs in h[er] favor."

Branton, 272 F.3d at 740 (citation omitted). This statement is in stark contrast to *Gonzalez*. Just as significantly, the decisions in both *Branton* and *Delgado* are equally at odds with the decisions of this Court. This Court has concluded that the First Amendment protects only the public employee who speaks "as a citizen." By contrast, the plaintiffs in *Branton* and the present case were both speaking solely within the established scope of their duties.

Like the Seventh Circuit, the Sixth Circuit has also had problems in drawing this line. In *Thomson v. Scheid*, 977 F.2d 1017, 1019 (6th Cir. 1992), a county fraud investigator sued for the violation of his First Amendment rights resulting from his investigative efforts and complaints regarding a county commissioner. The Sixth Circuit upheld summary judgment for the defendants on the First Amendment claim; certain conversations about the subject of the inquiry with outside investigators were approved by the plaintiff's supervisors and the "plaintiff was [thus] acting in the course of his employment in his conversations" with the investigators. *Id.* at 1021. "He therefore was not speaking out as a citizen with regard to his investigation, and his conversations . . . are not protected by the First Amendment." *Id.*

By contrast, eleven years later, the same circuit in *Taylor v. Keith*, 338 F.3d 639, 640-1 (6th Cir. 2003), held that a police officer and sergeant were entitled to proceed on their First Amendment claims despite the fact that the speech seemingly arose in the course of their employment. The plaintiff officers had been involved in the arrest of a resisting individual. *Id.* at 641. A third officer responded to assist. *Id.* After the individual had been subdued, the first two officers had to leave the scene for a short time to provide medical care for one of them. *Id.* Upon return, they noted that the arrestee with a head injury. *Id.* Subsequently, "Officer Taylor filled out the *required* Use of Force Report wherein he implicated [the third officer] in the beating of" the arrestee. *Id.* (emphasis supplied). Some time later, the other plaintiff officer, Sergeant Taylor (the father of the Officer Taylor), suggested to a superior officer that perhaps the third officer should be moved to work in a different area of the municipality if he had a problem with

the proper use of force. *Id.* Both Taylors cooperated in a police internal affairs investigation in the matter, but were then subsequently dismissed for allegedly covering up the incident. *Id.* at 642. There was evidence that both Taylors had taken steps to protect rather than expose the third officer. *Id.*

In attempting to distinguish *Thomson*, the *Taylor* court simply held that in *Thomson* it did not "purport to strip public employees of the First Amendment's protection for all speech that occurs in the course of employment." *Taylor*, 338 F.3d at 644. It then reiterated its earlier interpretation of this Court's decision in *Connick* "that 'the key question is not whether a person is speaking in his role as an employee or citizen, but whether the employee's speech in fact touches on a matter of public concern.'" *Taylor*, 338 F.3d at 645, *quoting Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 (6th Cir. 2001). Of the defendants' attempt in *Taylor* to rely on the holding in *Thomson* that because "plaintiff was acting in the course of his employment in the conversations," "[h]e therefore was not speaking as a citizen with regard to his investigation and his conversations . . . are not protected by the First Amendment" (*Thomson*, 977 F.3d at 1021), the *Taylor* court says simply that context is not "determinative." *Taylor*, 338 F.3d at 644-5.

From the foregoing discussion it is apparent that the lower courts have had a difficult time determining whether or just how much of a law enforcement officer's speech about official misconduct should be protected by the First Amendment, particularly, where, as here, this category of public employees is duty-bound to investigate and report upon such conduct. Brightly illuminating this issue and making clear the need for this Court's intervention is

the concurring opinion of Judge O'Scannlain in *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004) (petition for rehearing *en banc* pending).

In *Ceballos*, the court considered a memorandum authored by a supervising deputy district attorney outlining his concerns that a deputy sheriff had submitted a false affidavit for a search warrant in a case under the attorney's supervision. *Id.* at 1170-1. The deputy district attorney claimed that the defendant supervisors and the defendant district attorney retaliated against him for his statements in his memorandum, for discussing his views about this matter with others, and for testifying at a hearing in the subject case. *Id.* at 1171.

Two members of the three-judge panel concluded that the speech was protected by the First Amendment, following a previous decision by that circuit in *Roth v. Veteran's Admin. of United States*, 856 F.2d 1401 (9th Cir. 1988). The two judges rejected the defendants' argument that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Ceballos*, 361 F.3d at 1175.

Judge O'Scannlain chose only to concur because "*Roth* . . . controls the result . . . ." *Id.* at 1185. He went on to write a separate opinion because he believes "that *Roth* was wrongly decided and that it ought to be overruled, perhaps even by our court's rehearing the present case *en banc*." *Id.*

In his view, "*Roth* minimized – indeed, it entirely ignored – the significance of *Connick's* distinction between speech offered by a[] public employee acting *as an employee* in carrying out his or her ordinary employment

duties and speech spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.* at 1187 (emphasis in original). "By focusing only on *Connick's* public concern/purely personal interest axis, *Roth* improperly quashes the controlling caselaw's accompanying distinction between an employee's viewpoint-laden personal speech and his or her ordinary job-related speech." *Id.*

The concurrence then reviews many of the appellate court opinions that have revealed the struggle in drawing the proper line under the First Amendment. *Id.* at 1187-8. The judge bemoans that the six other circuits that have addressed in some fashion this issue have failed "fully to rationalize their recognition of *Connick's* distinction among the roles of a public-employee speaker has in some instances" and that this has "emboldened subsequent panels putatively to distinguish these cases [withholding protection for speech that is a part of the employee's job responsibilities], or otherwise to attempt to narrow the scope of their holdings." *Id.* at 1188 n. 2. In making this comment, he cites in particular to the *Gonzalez/Delgado* dichotomy, saying of the distinction drawn by *Delgado* that it is "particularly thin." *Ceballos, supra.* Of the collection of decisions of all of the circuits that are considered, he ultimately states "such deep confusion within the circuits over the scope of *Connick* – indeed, over the scope of their own cases interpreting *Connick – seems a clarion call for higher review.*" *Ceballos, supra* (emphasis supplied).

These cases generally pose the particularly difficult and sensitive problem of, on the one hand, balancing the public's interest in exposing official wrongdoing with, on the other, the government's interest in promoting efficient and effective governmental services. If, as the Seventh

Circuit decided in this case, *all* such speech about police or other official misconduct receives protection, these employees truly will be able to transform into a First Amendment claim any dispute arising out of their job duties.

This Court should accept the petition in this case to provide needed guidance to the lower courts on this significant issue of First Amendment jurisprudence. The fact that *Pickering* imposes a balancing test does not justify a legal regime in which various courts of appeals reach different results from one another in analogous situations or even results that appear to depart from their own intracircuit precedents.

II. THE COURT SHOULD PROVIDE GUIDANCE ON WHETHER QUALIFIED IMMUNITY CAN BE DENIED, AS IT WAS IN THIS CASE, ON THE BASIS OF A GENERAL STATEMENT THAT A PUBLIC EMPLOYER CANNOT VIOLATE THE FIRST AMENDMENT RIGHTS OF ITS EMPLOYEES OR WHETHER LOWER COURTS MUST LOOK TO CONTROLLING PRECEDENT BASED ON SIMILAR FACTUAL SITUATIONS.

A lower court addressing the issue of qualified immunity may have to address a second issue: "[i]f a violation could be made out on a favorable view of the parties' submissions the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. This Court in *Saucier* has directed unequivocally that in answering this second question a court may not simply refer to a general constitutional doctrine to resolve the issue of qualified immunity. For example, it "is not

enough" to contend that the Fourth Amendment prohibits arrests without probable cause. *Saucier*, 533 U.S. at 202.

Further, as this Court emphasized in *Saucier*, "[t]his inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition. . . . " *Id.*, 533 U.S. at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*, 533 U.S. at 202 (citation omitted).

The Seventh Circuit in *Delgado I* appeared to hold that it is unnecessary to consider whether any earlier, controlling decision has addressed whether the police official can retaliate against a subordinate who is duty-bound to report allegations of such misconduct. By contrast, other courts of appeals in the context of a First Amendment claim by a law enforcement officer have taken an entirely different path on this issue.

The starting point is the Seventh Circuit's decision in this case. After concluding in *Delgado I* that Delgado had engaged in protected speech, the court considered the second step of the qualified immunity analysis and stated dismissively that "the defendants have no valid argument." *Delgado*, 282 F.3d at 520 (Pet. App. 17). As the grounds for its conclusion, the Seventh Circuit restated its holding in *Gustafson v. Jones*, 117 F.3d 1015, 1021 (7th Cir. 1997): "'[i]t has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position.'" *Delgado*, 282 F.3d at

520 (App. 17-18). But this holding sets forth only a general statement of the protection afforded by the First Amendment. Nowhere does it refer to the particular factual circumstances of this case, namely, a vice control police detective fulfilling his expected duty of reporting on drug and related activities.

The Seventh Circuit's review of existing caselaw in *Delgado I* is similarly lacking in its scrutiny of the particular factual contexts of the cases. The court starts with a brief discussion of *Gonzalez*, dismissing that case as having been decided after Chief Jones' decision to transfer Delgado. *Delgado*, 282 F.3d at 520 (Pet. App. 18).

The court then proceeds to discuss *Morris*. In its analysis of Morris, the court notes merely that its sister circuit had "concluded that Morris' report was 'generated in the normal course of his duties as an accident investigator.'" *Delgado*, 282 F.3d at 520 (quoting *Morris*, 142 F.3d at 1382) (Pet. App. 18). The Seventh Circuit in *Delgado I* thus does not search for controlling precedent establishing that the First Amendment protects a public employee's speech that is out of the ordinary, but nonetheless made in furtherance of assigned responsibilities.

By its decision in *Delgado I*, the Seventh Circuit has thus concluded that a law enforcement official is not entitled to qualified immunity for transferring a subordinate officer, regardless of whether there is any pre-existing precedent providing the official with guidance in such a situation. As for the First Amendment analysis, the distinction drawn by the Seventh Circuit does not seem so obvious; that is, that employees who are exclusively assigned to investigate official misconduct should have no First Amendment protection for their report-writing, while

employees who as part of their routine duties occasionally must address such a situation would enjoy such protection. In distinguishing *Morris* in the qualified immunity analysis and in distinguishing *Gonzalez* in discussing the substance of whether such speech is protected, the Seventh Circuit was doing nothing more than staking out the position that certain "whistleblowing" is protected as a matter of law, and that other "whistleblowing" is not. This distinction makes little sense, and completely ignores the very significant governmental interest in properly supervising employees charged with duties that go beyond simply investigating claims of official misconduct.

The Seventh Circuit's analysis in *Delgado I* runs contrary to this Court's holding in *Saucier*. In *Saucier*, this Court held that references to general principles were insufficient, and that immunity applied unless the official would know that the law was "clearly established" under the particular circumstances confronting the public employee. *Saucier*, 121 S. Ct. at 2156. *Delgado I* essentially eliminates the "particular circumstances" requirement in the First Amendment context.

In this important respect, the Seventh Circuit's analysis departs from that of other circuits. In *Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 69 (1st Cir. 2002), a case decided by the First Circuit only a few months after *Delgado I*, the court explicitly stated that, "[i]mmunity exists even where the abstract 'right' invoked by the plaintiff is well-established, so long as the official could reasonably have believed 'on the facts' that no violation existed." In determining that the individual officers were entitled to qualified immunity, the *Dirrane* court specifically held that, "[h]ere, as is common where there is a lack of precedent, this is not a case in which a reasonable

officer *must* have known that he was acting unconstitutionally." *Dirrane*, 315 F.3d at 71 (footnote omitted) (emphasis in original).

In *Dirrane*, the plaintiff officer made a number of complaints to his superiors, including claims that other officers were playing cards during working hours, that supervisors waived firearm licensing requirements, that there were inadequate accounting safeguards and, most seriously, that there were falsified fingerprint reports and destroyed fingerprint evidence. *Dirrane*, 315 F.3d at 67-8. In concluding that there was qualified immunity, the *Dirrane* court categorized the case as one that was "not the archetypal case of an employee who blows the whistle on government misdeeds and is fired." *Id.* at 70-1. "The serious charges that Dirrane made were nestled in a morass of complaints [and] . . . [t]he department had some basis for distrusting Dirrane's judgment." *Id.* at 71. The appellate court noted, furthermore, that the defendant department "did not try to fire him; it just moved him to a position even he described as a second choice." *Id.*

These factual distinctions notwithstanding, the approach to the qualified immunity analysis in *Dirrane* is quite different from that of *Delgado I*. The First Circuit in *Dirrane*, followed *Saucier* and concluded that immunity existed because there was no comparable, previously-decided case establishing that the officials were acting unconstitutionally even where the speech in both cases addressed the very important issue of public protection and police services.

In an opinion from a few years earlier, the Tenth Circuit took an approach that, at first blush, appears much closer to that of the Seventh Circuit. In *Dill v. City*

of Edmond, 155 F.3d 1193, 1200-1201 (10th Cir. 1998), the court dealt with a claim based upon a letter written by a police detective to the police chief alleging that certain exculpatory evidence had been suppressed in the course of a murder investigation. In undertaking the qualified immunity analysis, the court reaffirmed its earlier decision that, "in order for the law to be clearly established, such that there is no qualified immunity, there must be a Supreme Court or Tenth Circuit decision on point, or the clear weight of authority from other courts 'must have found the law to be as the plaintiff maintains.'" *Dill*, 155 F.3d at 1205, quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). The *Dill* court held that "when Defendants transferred Plaintiff, the law was clearly established so that Defendants should have realized that their actions would violate the First Amendment." *Id.*

In supporting that conclusion, however, the *Dill* court first explained merely that, "[a]s early as 1986, we held that employment actions short of discharge may give rise to First Amendment claims." *Id.* (citation omitted). It then further explained that before 1992 "the Supreme Court also held that denial of promotions, transfers and other employment opportunities may give rise to First Amendment claims." *Id.* (citation omitted). The court then referred to decisions from other courts of appeal that had reached the same conclusion on that issue. *Id.*

The *Dill* court, however, never discussed, much less cited, any cases holding that speech by a police officer to his supervisor about alleged improprieties in an investigation in which he participated was "clearly established" to be protected speech. The *Dill* court merely addressed whether a law-enforcement official would have known that

a transfer was the type of employment action that could form the basis for a First Amendment claim.

Moreover, the opinion in *Dill* does not articulate the defendant's precise arguments for qualified immunity. If the *Dill* court addressed the nature of the employment action rather than the basis for it because that was the only point argued by the defendants, then *Dill* is much closer to *Dirrane* than it is to *Delgado*. It addresses pre-existing case law in the circuit and from this Court on the precise point and the particular circumstances (i.e., transfer rather than demotion or discharge). If it is a more general point, however, and if *Dill* is closer to *Delgado*, this only tends to reinforce the lack of clarity in the approach among the circuits to this issue.

The approach taken by the Eleventh Circuit, however, is quite clear and in line with the approach taken by the First Circuit in *Dirrane*. In *Stanley v. City of Dalton*, 219 F.3d 1280, 1282-5 (11th Cir. 2000), the court considered a case in which a law enforcement officer claimed that he had suffered various acts of retaliation because of his statements to state investigators that he had a theory that his department's police chief might have stolen some things from the evidence room. The appellate court quickly concluded that Stanley's speech, though only a theory, nonetheless related to a matter of public concern. *Id.* at 1288.

In evaluating whether "a reasonable police chief would know that terminating a subordinate officer in these factual circumstances violated clearly established law," the Eleventh Circuit stated that it had to "examine the precise conduct by [Chief] Chadwick and Stanley – such as, the precise information Stanley had before his

G.B.I. interview and Chadwick possessed about Stanley's misconduct before terminating him – in order to determine whether a reasonable police chief would have known that terminating Stanley violated clearly established law." *Id.* at 1294. "The question is not whether a reasonable police chief would know the general principle that it violates the law to terminate a public employee in retaliation for protected speech." *Id.*

The chief argued that even assuming the facts in the light most favorable to the plaintiff, the evidence indicated that the chief had mixed motives in his retaliation against Stanley; that is, that he had certain valid reasons for terminating Stanley as well as the claimed invalid ones. *Id.* at 1295. He then further argued that the Eleventh Circuit had previously determined that in such a situation immunity would apply. *Id.*

The Eleventh Circuit agreed with this argument: "[a] defendant is entitled to qualified immunity under [their earlier case] only where, among other things, the record indisputably establishes that the defendant in fact was motivated, *at least in part*, by lawful considerations. *Id.* at 1296 (emphasis in original).

The court's analysis in *Stanley* stands in complete contrast to that in *Delgado I*. In *Delgado I*, the Seventh Circuit did not consider whether there had been a decision within the Seventh Circuit pre-dating Delgado's transfer that would have provided Chief Jones with guidance as to whether he could transfer Delgado without violating his First Amendment rights. The only case even considered by the Seventh Circuit came from a different jurisdiction, the Eleventh Circuit, and in that case, *Morris*, the court held

that there was no First Amendment protection for the subject speech.

Approximately two weeks after the Seventh Circuit issued its second decision in *Delgado*, the Fifth Circuit, sitting *en banc*, considered the issue of qualified immunity and speech by a police officer in the case of *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004). The Fifth Circuit split 9 to 6 in denying qualified immunity to the individual defendants. Various Texas police chiefs and their association chose to boycott a police academy after two of its law enforcement instructors testified as expert witnesses in a federal civil rights lawsuit against an officer from an entirely different part of Texas. *Id.* at 341-345. The decision gives a glimpse of the intense debate in that circuit as to whether qualified immunity protects the defendant police officials.

In arguing for qualified immunity, the officials contended "that their conduct is not actionable under the First Amendment because their decisions on whether and where to enroll officers are discretionary in the sense that no contract required them to enroll their officers in Kinney's and Hall's courses." *Id.* at 357. The defendant officials did "not dispute that the instructors spoke on a matter of public concern. . . . " *Id.* at 361. The court then spent considerable time analyzing the *Pickering* balance applied to the particular facts of the case. *Id.* at 361-7. This then left the question of whether it was "clearly established" at the time of the official's action that they could not take action as a result of the instructor's speech. *Id.* at 367.

The majority of the appellate court held that there was "no question that it was clearly established well

before October 19, 1998 that Kinney's and Hall's testimony was of public concern and thus was speech protected by the First Amendment." *Id.* at 367 (footnote omitted). In support of this proposition, the majority cites earlier cases holding that testimony in a judicial proceeding was inherently of public concern. *Id.*, n.35. The Fifth Circuit thus followed the path taken by *Dirrane* and *Stanley* with respect to the question of whether earlier cases had established that the subject of the speech was protected in a part of this context.

In *Kinney,* the defendant law enforcement officials argued with respect to qualified immunity that it was not the "subject" but another part of the "context" of their actions that provided them with immunity protection. "The Police Officials . . . suggest that it was not clear that the First Amendment imposed any restrictions on their conduct vis-a-vis Kinney and Hall as their training instructors." *Id.* In other words, "the Police Officials say that their duties with respect to Kinney and Hall were unclear because the instructors were 'employees of a "disappointed bidder" – i.e., Kilgore college.'" *Id.* at 368. In support of their argument, they cited an earlier decision of this Court reserving that question for future consideration. *Id.*

The majority refused to agree with this argument, concluding that "the Supreme Court and this court have explicitly rejected such reasoning." *Id.* at 368. "Indeed, the Supreme Court's decisions in *Pickering*, *Umbehr* and *O'Hare Truck Service* are predicated on the assumption that although the government may have other relationships with individuals in addition to the citizen-sovereign relationship, individuals do not, as the result of such relationships, cease to be citizens with First Amendment rights that the government is obligated to respect." *Id.* The

majority analysis thus rests upon the proposition that in general the First Amendment prohibits government officials from taking retaliatory actions against individuals who are merely citizens and not employees or disappointed bidders because of their speech. In adopting this general rationale, the majority conceded "that our past cases do not include one that has specifically addressed retaliation against instructors at a police academy." *Id.* at 371. In the view of the majority, however, this did not prevent rejection of qualified immunity; "[a]s the Supreme Court has recently admonished, 'officials can still be on notice that their conduct violates established law even in novel fact situations.'" *Id.*, quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002).

The analysis applied by the Fifth Circuit in *Kinney* is notable for two reasons. First, the analysis remains true to the general mandates of this Court in *Saucier* that lower courts must look to precedent establishing some clearly established general principle that would no doubt apply to a novel fact situation in order to determine whether the law was "clearly established" in the context of First Amendment claims. Second, while the majority in *Kinney* followed the principle that a general doctrine governs the decision in the particular case, it did so in connection with the particular factual context of the lawsuit, rather than just relying upon a general principle that speech about law enforcement issues and public protection is generally protected. The approach of the Fifth Circuit is thus quite distinct from the incomplete analysis employed by the Seventh Circuit in *Delgado*.

The First Circuit also applied this method of analysis in a decision issued just two days before *Delgado I*. In *Rivera-Jimenez v. Pierluisi*, 362 F.3d 87 (1st Cir. 2004), the

court concluded, in undertaking the first step in the qualified immunity analysis, that "despite defendants' arguments to the contrary, plaintiffs' speech raised the possibility of corruption in a public agency and is therefore protected under the First Amendment." *Id.* at 94, *citing Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 11-12 (1st Cir. 2003).

The court then undertook the second part of qualified-immunity analysis: whether the right is clearly established. *Rivera-Jimenez*, 362 F.3d at 95. "'One tried and true way of determining whether [a] right was clearly established at the time the defendants acted, is to ask whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights.'" *Id.*, *quoting Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 93 (1st Cir. 2002). Citing to a consent decree "where the claims alleged were the same as here," the First Circuit approved the decision of the magistrate judge, "looking to the caselaw as it existed at the time, which had held that these types of retaliatory action in employment, involving a public employee's speech on a question of public concern, was a clear violation of the First Amendment." *Rivera-Jimenez*, 362 F.3d at 95 and n.5. The First Circuit thus appears to have taken a course that adheres to this Court's directive in *Saucier*, and that once again contrasts sharply with the one followed by the Seventh Circuit in the present matter.

As demonstrated above, the Seventh Circuit's approach in *Delgado I* is at odds with various of its fellow circuits because it does not follow this Court's mandate in *Saucier* that lower courts must consider the particular situation confronting a reasonable public official in determining the question of qualified immunity. Thus, this

Court should grant this petition to make clear that the Seventh Circuit's preemptory analysis of First Amendment protections in the context of qualified immunity provides insufficient protection to public officials and that a more detailed analysis of the factual situation is required.

Respectfully submitted,

GRANT F. LANGLEY
City Attorney
RUDOLPH M. KONRAD
Deputy City Attorney
JAN A. SMOKOWICZ
Assistant City Attorney
Counsel of Record
OFFICE OF THE MILWAUKEE CITY ATTORNEY
Room 800, City Hall
200 East Wells Street
Milwaukee, WI 53202
(414) 286-2601

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued March 29, 2004
Decided April 1, 2004

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 03-3408

OCTAVIO DELGADO,
Plaintiff-Appellee,

v.

ARTHUR JONES, Chief,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin,

No. 00 C 0917

Lynn Adelman, Judge.

ORDER

This is the second time this case has been before this Court. The first time around we affirmed the district court's denial of the defendant's motion to dismiss based on qualified immunity. *See Delgado v. Jones,* 282 F.3d 511 (7th Cir. 2002). Since that time, the parties have engaged in discovery and the defendant has moved for summary judgment, again based on qualified immunity. The district court denied the defendant's motion and this appeal

followed. For the reasons discussed *infra,* we affirm the decision of the district court.

We have already essentially discussed and decided in our earlier opinion the issues which have been raised here. *Id.* In that opinion, we distinguished this case from *Gonzalez v. City of Chicago,* 239 F.3d 939 (7th Cir. 2001). *Id.* at 519. Appellant argues that the "new" facts developed in discovery make this case indistinguishable from *Gonzalez.* However, as our earlier opinion demonstrates, *Gonzalez* is not applicable here.

Gonazlez's [sic] job was to do internal investigations. He did 50-100 internal investigations every month. He was retaliated against based on one of his internal investigations which was indistinguishable from every other investigation in which he was involved. In contrast, Delgado's job was not to do internal investigations. His job was to do routine narcotics investigations. Thus, Delgado's investigation here was not a routine discharge of an assigned duty as in *Gonzalez.* Jones argues otherwise, but it was Jones himself who said that Delgado should not have been investigating the matter in question.

The Appellant also argues that Delgado lacked any discretion regarding his communications because he was told specifically by his supervisor what to investigate and memorialize. Delgado, however, exercised a great deal of discretion. First, he decided to bring the matter up with his supervisor in the first place, which was not the usual process. Second, he decided to show his supervisor the actual letter he had received instead of simply summing it up and omitting information in relation to Jones. Third, he recommended to his supervisor that an independent investigation be conducted. The fact that it was Delgado's

superior rather than Delgado who ultimately brought the matter to the attention of Jones is of little relevance, given that it was Delgado who started the ball rolling, and the investigation was easily traced back to him.

Finally, the Appellant argues that we should decide as a matter of law that Delgado was not motivated, even in part, by public concern. The facts, as we must assume them to be at this stage of the litigation, suggest otherwise. Delgado was the one who initially suggested that the matter be reviewed by an independent, outside investigator. He was also willing to pursue the matter despite the fact that his supervisors suggested it might result in retaliation. His deposition testimony reflects his concern with the matter. Although he may have been unwilling to take more heroic measures, he undoubtedly hoped that the matter would be investigated.

For these reasons, we believe that no new evidence or argument presented by the Appellant would alter the holding of our earlier opinion in *Delgado I* as applied to this summary judgment. Therefore, we AFFIRM the district court's denial of defendant's motion for summary judgment.

In the

United States Court of Appeals

for the Seventh Circuit

No. 01-1460

OCTAVIO DELGADO,

Plaintiff-Appellee,

v.

POLICE CHIEF ARTHUR JONES and
DEPUTY CHIEF MONICA RAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 00 C 917 – **Lynn Adelman**, *Judge.*

ARGUED SEPTEMBER 5, 2001 – DECIDED MARCH 8, 2002

Before CUDAHY, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Octavio Delgado is a detective with the Milwaukee Police Department who alleges that he was transferred to a less desirable position and denied vacation time in retaliation for an investigation in which he participated and a memorandum that he wrote about alleged criminal activities involving a close relative of an elected official. This elected official is also purported to be a close personal friend of the Chief of Police, Arthur Jones, one of the defendants. In turn, Deputy Chief Monica Ray

is alleged to have been involved in the sequence of events leading to the transfer. The district court denied the defense of qualified immunity. Under the Supreme Court's ruling in *Behrens v. Pelletier,* 516 U.S. 299, 306 (1996), a denial of a qualified immunity defense is immediately appealable under 28 U.S.C. § 1291. We now affirm the decision of the district court.

I.

Octavio Delgado is a 15-year veteran of the Milwaukee Police Department (MPD). In December of 1997, Delgado began working in the department's Vice Control Unit. Thereafter, until his alleged retaliatory transfer on May 18, 2000, Delgado had been receiving satisfactory job evaluations.

In April 2000, or thereabouts, Delgado served as part of a drug entry team that executed a search warrant at a suspected drug house within the City of Milwaukee. This police operation ultimately resulted in the arrest of several persons. In May of 2000, Delgado received a letter from an individual arrested during the execution of the April search warrant. The letter claimed that the arrestee had information about the buying and selling of drugs by public school employees and the patronage of a drug house by a close relative of a public official as well as knowledge of a drug dealer who lived with a state employee. The letter also stated that Chief of Police Jones was a close personal friend of the public official whose immediate relative was alleged to have frequented the drug house. Delgado then showed the letter to his supervising lieutenant, who commented: "What district do you want to be transferred to?" According to the appellee's brief, the

intended inference of the supervisor's comment was that investigations of politically sensitive matters often result in unfavorable treatment, including unwanted transfers.

Delgado was subsequently ordered to interview the author of the letter (the former arrestee) in order to corroborate the details of the letter. Delgado was then instructed to write a "Matter of" memorandum summarizing the contents of the interview with the former arrestee and to submit it to his lieutenant.

This memo ultimately moved up the chain of command to Deputy Chief Ray, who recommended that it be investigated by an outside law enforcement agency. It is unclear from the complaint whether Deputy Chief Ray had the authority to make this decision. Nevertheless, on May 18, 2000, Chief Jones was notified of the "Matter of" memorandum. In a meeting with Delgado's captain and Deputy Chief Ray, Chief Jones ordered that the investigation stay within the MPD and instructed Delgado's captain not to discuss the "Matter of" memorandum with Delgado or anyone else.

The following day, Chief Jones issued an order transferring one person, Delgado, from the Vice Control Division to the Criminal Investigations Bureau, retroactive to the previous day, Thursday, May 18. According to the complaint, this transfer was a departure from normal practice, since most transfers occur on Fridays at the end of a pay period and take effect the following Sunday. Moreover, the unit Delgado was transferred out of already had several vacancies.

From May 18 until May 26 Delgado was on vacation. During this period, the letter writer was allegedly interrogated by other MPD officers on the subject of his earlier

interview with Delgado. When Delgado returned to work on the 26th, he was ordered to undergo a urine drug test and was informed that he was under investigation by the MPD's Internal Affairs Division for his communication with the letter writer, allegedly in violation of a departmental rule.

On the same day, Delgado also received a second letter from the same arrestee providing additional information on potential drug dealers. Delgado forwarded this letter to his former lieutenant in the Vice Squad Unit. The following day, Delgado asked both his former lieutenant and a captain in the Vice Squad Unit why he had been transferred, and he was advised that Chief Jones had forbidden any communication by these supervisors with Delgado.

Finally, Delgado claims that in the succeeding weeks and months, his pre-approved vacation schedule was unilaterally truncated or cancelled in accordance with rules that were not being applied to his fellow officers. Again, according to the complaint, Delgado had been receiving good performance evaluations. In addition, the MPD has a rule prohibiting the use of transfers as a form of discipline.

On a motion for a judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c) and 12(h)(2), the district court denied the appellants' request that they be accorded the defense of qualified immunity.

II.

This case presents two issues on appeal: (1) whether both Chief Jones and Deputy Chief Ray are entitled to qualified immunity because, within the specific context of

this case, a reasonable official would not have concluded that Detective Delgado had a First Amendment right to free speech; and (2) whether Deputy Chief Ray, who forwarded Detective Delgado's "Matter of" memorandum to Chief Jones, is also entitled to qualified immunity because her role in any alleged retaliation was entirely ancillary and administrative in nature. A motion for a judgment on the pleadings under Fed. R. Civ. P. 12(c), like a motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6), should not be granted "unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Gustafson v. Jones,* 117 F.3d 1015, 1017 (7th Cir. 1997) (quoting *Frey v. Bank One,* 91 F.3d 45, 46 (7th Cir. 1996)). In evaluating the motion, we view the allegations of the complaint in the light most favorable to the nonmoving party. *See id.* The standard of review in determining the validity of a qualified immunity defense and the underlying interpretation of the First Amendment is de novo, with the courts' accepting all well-pleaded factual allegations as true, and making all permissible inferences in the plaintiff's favor. *See id.* at 1017-18.

As a threshold matter, the Supreme Court's jurisprudence on qualified immunity requires that this issue be resolved at the earliest stages of litigation. In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court limited the inquiry for qualified immunity to an objective reasonableness standard in order to facilitate judgment as a matter of law and concluded that "[u]ntil this threshold immunity question is resolved, discovery should not be

permitted." *Id.* at 818-19.[1] Therefore, in order for a plaintiff to successfully defeat a qualified immunity defense, two conditions must be satisfied: (1) the complaint must adequately allege facts that, if true, would constitute a violation of a constitutional right; (2) the case law must be "clearly established" at the time of the alleged violation, so that a reasonable public official would have know [sic] that his conduct was unlawful. *Id.*[2]

In *Siegert v. Gilley,* 500 U.S. 226 (1991), the Court observed that a decision "of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time-consuming preparation to defend the suit on the merits." *Id.* at 232. One of the intended effects of the qualified immunity defense is "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Id.* The policy that underlies this judicially created doctrine is that meritless and insubstantial lawsuits can distract officials from their public duties, inhibit the exercise of independent judgment and discretion and

---

[1] A qualified immunity analysis can be conducted on the facts alleged in the plaintiff's complaint, though many qualified immunity determinations are made in the context of summary judgment, where materials outside the pleadings may be considered. Obviously, discovery may occur if a defendant does not raise the qualified immunity defense.

[2] The *Harlow* court also noted that in extraordinary circumstances, a defense of qualified immunity can be sustained if the official "can prove that he neither knew nor should have known of the relevant legal standard. . . . But again, the defense would turn primarily on objective factors." 457 U.S. at 819. This nuance has no application here.

ultimately discourage highly qualified citizens from entering public service. *See Harlow,* 457 U.S. at 814 (discussing the "social costs" that flow from lawsuits against innocent public officials); *see also Donovan v. City of Milwaukee,* 17 F.3d 944, 947 (7th Cir. 1994) (observing that "few individuals will enter public service if such service entails the risk of personal liability for one's official decisions").

Here, our review of the district court's denial of the qualified immunity defense must focus on two issues: (1) Did the defendants' alleged conduct amount to a violation of Delgado's First Amendment rights? (2) Was this conduct clearly established as a violation of the Constitution at the time of the alleged violation?

A.

For a First Amendment retaliation claim to survive a judgment on the pleadings, we have held that "the facts alleged in the complaint must show that (1) the speech in which the plaintiffs engaged was constitutionally protected under the circumstances, and (2) the defendants retaliated against them because of it." *Gustafson,* 117 F.3d at 1018 (citing *Caldwell v. City of Elwood,* 959 F.2d 670, 672 (7th Cir. 1992)). Moreover, in the context of a qualified immunity defense, "The plaintiff bears the burden of establishing the existence of a clearly established constitutional right." *Donovan,* 17 F.3d at 951-52 (citing *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir. 1988) (*en banc*)).

The Supreme Court has held that the speech of a government employee warrants First Amendment protection if that speech "addresses a matter of public concern." *Connick v. Myers,* 461 U.S. 138, 147 (1982).[3] Whether the employee's speech falls under the rubric of public concern must be determined "by the content, form, and context of a given statement, as revealed by the record as a whole." *Id.* at 147-48. Of these three factors, this court has determined that the content of the speech is the most important. *See Campbell v. Towse,* 99 F.3d 820, 827 (7th Cir. 1996); *Glass v. Dachel,* 2 F.3d 733, 740 (7th Cir. 1993).

The Supreme Court's First Amendment jurisprudence also requires that a court, in determining the nature of a public employee's speech, seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public service." *Connick,* 461 U.S. at 142 (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)). However, this inquiry, which is commonly know as the *Pickering* balancing test, can seldom be done on the basis of the pleadings alone. *See Gustafson,* 117 F.3d at 1019 (noting that "it would be a rare case indeed where the pleadings as a whole would permit judgment as a matter of law on this point, unless the plaintiff was relying on speech that is wholly unprotected by the First Amendment or the

---

[3] The Supreme Court in *Connick* suggested the possibility that speech might also be protected under the First Amendment "even if not touching upon a matter of public concern." 461 U.S. at 147. However, the Court failed to specifically articulate what type of speech would fall into such a category. Similarly, this court restricts its analysis to the issue of what constitutes a public concern.

defendant's justifications were frivolous"); *Jefferson v. Ambroz,* 90 F.3d 1291, 1296-97 (7th Cir. 1996) (ruling for the defendant because the plaintiff included in his complaint facts that established that the defendant would prevail under the *Pickering* balancing test). In most cases, application of the *Pickering* balancing test will be possible only after the parties have had an opportunity to conduct discovery. *Gustafson,* 117 F.3d at 1019. However, even at an early stage of litigation, a First Amendment retaliation claim can sometimes be resolved on the public concern test on the basis of the three *Connick* factors of content, form and context of the disputed speech.

In terms of content, this court has determined that police protection and public safety are generally a matter of public concern. *See Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir. 1990) (*en banc*) ("It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety."); *Glass,* 2 F.3d at 741 ("Obviously, speech that focuses on police departments (and ultimately police protection and public safety) involve matters of great public concern."). Here, Delgado's complaint alleges that a former arrestee sent him a letter that contains information about criminal drug activity. The letter alleges that a close relative of an elected official had been frequenting a drug house, and that Chief Jones was a close personal friend of this elected official. A subsequent interview with the arrestee corroborated the claims of the letter. All of this information was contained in the "Matter of" memorandum. For this reason, Delgado's captain provided a copy of this memorandum to Deputy Chief Ray with a recommendation that an investigation be conducted by an outside law enforcement agency.

Thereafter, Delgado has alleged specific instances of retaliation, including an unsolicited job transfer and restrictions on his enjoyment of vacation that occurred immediately after the Chief received the "Matter of" memorandum. Moreover, Chief Jones decided to ignore the recommendation that an outside agency conduct the investigation; he ordered Delgado's supervisors not to discuss Delgado's memorandum with anyone. In addition, the supervisors were allegedly ordered not to discuss the transfer decision with Delgado.

Certainly, a communication by a law enforcement officer that contains information essential to a complete and objective investigation of serious criminal activity is "content" that implicates public concern. Moreover, the *Connick* factors of form and context, which can be clarified by an examination of an employee's motivation, also support Delgado's claim. In *Linhart v. Glatfelter,* 771 F.2d 1004 (7th Cir. 1985), an acting police chief of a municipality claimed that his various behind-the-scene activities, which were designed to secure him the chief's position on a permanent basis, were protected speech under the First Amendment. In rejecting the plaintiff's claim, we stated that an inquiry under *Connick* "requires us to look to the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or was the point to further some purely private interest?" *Id.* at 1010 (emphasis in original). In *Linhart*, the plaintiff had engaged in conversations designed to persuade his principal rival to apply for a different position within the municipal government. We determined that the political or social content of the acting chief's speech was not sufficient to overcome the obvious self-interested context in which these conversations occurred.

As in *Linhart*, the inquiry into motivation relates to both the form and the context of Delgado's speech. Here, there are absolutely no facts in the pleadings suggesting that Delgado's communications, both in conversations with his supervisors and in his "Matter of" memorandum, would somehow benefit him personally. Quite to the contrary, after informing his lieutenant of the content of the arrestee's letter, Delgado was asked, "What district do you want to be transferred to?" Drawing all inferences in favor of Delgado, as we must at this stage of the litigation, this comment could certainly support the inference that employees who bring to light politically sensitive or embarrassing allegations about their superiors are often subject to unwanted job transfers. Although the manner in which Delgado performed his police work was apparently designed to bring on an appropriate investigation (and thus suggests a matter of public concern), there is no suggestion that Delgado also furthered some personal, private interest. Also, the fact that Delgado communicated privately with his superiors does not make his speech less a matter of public concern. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) ("Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.").

In arguing that Delgado's actions did not involve a matter of public concern, the defendants rely on *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001), for the proposition that communications that are part of an employee's regular job duties are not matters of public concern. In *Gonzalez*, a newly recruited police officer, who formerly served as a civilian employee of the Chicago

Police Department's Office of Professional Standards, was discharged shortly after completing his police academy training. Gonzalez claimed that poor job evaluations he had received were based on false information that was furnished to retaliate against him for several negative reports he had authored about police officers who were now his co-workers. In finding that Gonzalez's earlier work activities did not constitute protected speech under the First Amendment, this Court emphasized that Gonzalez was "clearly acting *entirely* in an employment capacity when he made those reports," *id.* at 941 (emphasis added), and that he "could have been fired had he *not* produced the reports," *id.* at 942 (emphasis added).

The defendants argue that under Milwaukee Ordinances 105-125 and 105-126, Delgado was duty-bound to report all violations of city ordinances to the Chief of Police and to arrest all persons found to have violated any law or ordinance. This argument, however, sweeps much too broadly. On the facts of this complaint, Delgado had information about criminal activity that potentially involved an immediate relative of an elected official, who also happened to be a close personal friend of Chief Jones. Fully divulging this information to his superiors may have been consistent with his obligations as a police officer in seeking an independent and objective investigation. And it was hardly in his personal interest to antagonize the Chief. *See Linhart,* 771 F.2d at 1010. But we think Delgado had considerable discretion about how he communicated the information up the chain of command. His disclosure went far beyond some rote, routine discharge of an assigned duty, as in *Gonzalez*. Our holding in *Gonzalez* is limited to routine discharge of assigned functions, where there is no suggestion of public motivation. In the case

now before the court, Delgado's communications with his superiors were designed not only to convey *information of* possible crimes, but also *additional facts* that were relevant to the manner and scope of any subsequent investigation. Effective police work would be hopelessly compromised if police officers could be retaliated against for communicating factual details (e.g., a supervisor's relationship to a criminal suspect) that bear on the department's ability to conduct an objective investigation. The fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen does not change this analysis.

In contrast, *Gonzalez* addresses a different scenario where the effective discharge of a public employee's *routine* duties touches on a matter of public concern – arguably a very broad category. In order to prevent every adverse employment decision from claiming the shield of First Amendment protection, *Gonzalez* requires some type of speech or expression that, in addition to objectively promoting or protecting a matter of public concern, is also a product of some independent discretion or judgment. 239 F.3d at 941 (noting that Gonzalez would have stated a claim had his employers asked him to rewrite his reports so as not to expose police corruption and he nevertheless undertook efforts to accurately communicate his findings). But the dichotomy between routine and discretionary functions is not quite the same as the distinction between public or private motive discussed in *Linhart*. The latter distinction has broader application.

We must weigh the interests of the public employee in speaking upon matters of public concern against the State's interest in furthering efficient public service, as required under the *Pickering* balancing test. *Gonzalez*

essentially represents a categorical judgment for the employer *insofar as* a public agency cannot efficiently carry out its functions if the faithful discharge of routine tasks could become grounds for challenging virtually any personnel decision. *See Connick,* 461 U.S. at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark . . . would plant the seed of a constitutional case."). *Gonzalez* clarified that "we are not 'establishing a per se rule exempting statements made in the course of official duties from the protection of the First Amendment.'" 239 F.3d at 942 (quoting *Koch v. City of Hutchinson,* 847 F.2d 1436 (10th Cir. 1988)). The broad sweep of the defendants' argument is essentially calling for such a per se rule, which this court rejected in *Gonzalez.*

Delgado has alleged sufficient facts to establish that his speech is constitutionally protected and that the defendants retaliated against him because of it. Therefore, his complaint states a valid First Amendment retaliation claim.

B.

After establishing that the plaintiff has adequately alleged a violation of a constitutional right, the second level of inquiry in a qualified immunity analysis involves whether the law was "clearly established" at the time of the alleged violation. Here, the defendants have no valid argument. In *Gustafson,* this court observed, "It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in

particular retaliation through a transfer to a less desirable position." 117 F.3d at 1020.[4] Although the defendants argue that *Gonzalez* somehow altered the First Amendment landscape in this Circuit, the alleged retaliation against Delgado occurred about eight months before our decision in *Gonzalez*, eliminating any possibility of reliance.

The defendants' only response to this argument is that the Eleventh Circuit had issued an opinion in *Morris v. Crow*, 142 F.3d 1379 (11th Cir. 1998), which seems to have announced a rule similar to *Gonzalez*. In *Morris*, an officer in the Polk County Sheriff's Office in Florida filed an accident report on a high speed collision that involved a fellow officer. In a lawsuit that followed, Morris gave deposition testimony about the accident that was damaging to his employer. After several months, the lawsuit was settled and Morris was then suspended and fired. The Eleventh Circuit concluded that Morris' report "was generated in the normal course of his duties as an accident investigator. The report discussed only his investigation and reconstruction of a single accident." *Id.* at 1382. The subsequent deposition in a civil lawsuit also was determined to have no constitutional import. *Id.* at 1383.

---

[4] Under *Harlow*, a court determines whether the law was "clearly established" at the time of the alleged violation; thereafter, an official's conduct can be measured against a standard of "objective reasonableness." 457 U.S. at 818. "If the law was clearly established, the immunity defense should fail, since a reasonably competent official should know the law governing his conduct." *Id.* at 818-19. Although this fact has no legal significance under the objective standard prescribed by *Harlow*, it is at a minimum ironic that Chief Jones was a defendant in *Gustafson*, a precedent which further settled the law in this Circuit on First Amendment retaliation claims.

However, as in *Gonzalez*, the Eleventh Circuit in *Morris* also expressed concern that routine public duties should not be elevated to a protected status under the First Amendment, lest every remark by a government employee "plant the seed of a constitutional case." 142 F.2d at 1382 (quoting *Connick*, 461 U.S. at 149). Although concerns of efficiency may require a safe harbor for personnel decisions that are made against the backdrop of an employee's routine job duties, this category is narrow and cannot be permitted to swallow the First Amendment. No doubt government efficiency can be equally compromised if government supervisors can freely pursue retaliation for speech that is politically sensitive or embarrassing.

In the case now before the court, Delgado was singled out by the former arrestee and given information on alleged criminal activity. Once this information was reduced to the "Matter of" memorandum, it was forwarded by Delgado's captain to Deputy Chief Ray with a recommendation that any subsequent investigation be performed by an outside law enforcement agency. Such a situation is certainly not routine. Moreover, because the subject of Delgado's communication was highly relevant to an independent and objective investigation of criminal activity and was not motivated by the personal interests of Delgado – in short, it was a matter of public concern – a public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule.

III.

Since Chief Jones allegedly ordered the unwanted job transfer and the change in Delgado's vacation schedule,

the defense of qualified immunity must fail as applied to him. Deputy Chief Ray, however, asserts that she is entitled to qualified immunity because her only role in this alleged sequence of events was to forward the "Matter of" memorandum to Chief Jones.

A judgment on the pleading, like a motion to dismiss, should not be granted "unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Cushing v. City of Chicago,* 3 F.3d 1156, 1159 (7th Cir. 1993) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)); *see also Gustafson,* 117 F.3d at 1017 (stating that in response to a motion under Rule 12(c), a court should not dismiss a claim "unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief"). At this early stage in the litigation, we have insufficient facts to conclude that Deputy Chief Ray played no part in any retaliation against Delgado. Therefore, the defense of qualified immunity must also fail with respect to Deputy Chief Ray.

We AFFIRM the decision of the district court and remand for further proceedings on the First Amendment retaliation claim.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

OCTAVIO DELGADO,
Plaintiff,

v.

Case No. 00-C-0917

ARTHUR L. JONES and
CITY OF MILWAUKEE,
Defendants.

DECISION AND ORDER

(Filed Aug. 11, 2003)

Plaintiff Octavio Delgado, a City of Milwaukee police officer, brings this action under 42 U.S.C. § 1983 against defendants Arthur Jones, the City's police chief, and the City.[1] Plaintiff alleges that defendants violated his First Amendment right to freedom of speech by transferring him to a less desirable position in the police department and reducing his vacation days in retaliation for statements he made. Defendants now move for summary judgment on the grounds that plaintiff's rights under the First Amendment were not violated and that Jones is entitled to qualified immunity.[2]

---

[1] I previously dismissed plaintiff's claims against Monica Ray, the deputy police chief, and have amended the caption to reflect this change.

[2] I previously denied defendants' motion to dismiss based on qualified immunity. The decision was affirmed by the Seventh Circuit. *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002).

I. SUMMARY OF FACTS

Plaintiff has served as a Milwaukee police officer since 1986, and in 1994 was promoted to the position of detective. In 1998, he began working for the Department's Vice Control Division ("VCD"), and was assigned as an undercover narcotics investigator. Since becoming an officer, plaintiff's job evaluations have been satisfactory.

On March 22, 2000, a citizen complained to the Mayor's office about the existence of an alleged drug house located on West Wright Street in Milwaukee. The Mayor's office forwarded the complaint to VCD with instructions to investigate. In late April, as part of a drug entry team, plaintiff searched the house pursuant to a warrant. The search resulted in the arrest of several individuals including a woman named Margaret Mullins. In May 2000, Mullins sent a letter to plaintiff stating that she had information about unlawful drug-related activity, including information about public school employees engaging in drug trafficking, a state employee living with a drug dealer, and the patronage of a drug house by a close relative of a public official. The letter also stated that the public official whose close relative frequented the drug house was a close personal friend of Jones.

Plaintiff recognized that the allegations were sensitive because of the references to a public official and to Jones, but he believed that they should be investigated. He did not want to personally investigate the matter and thought that the investigation could be best accomplished by an outside law enforcement agency.

Plaintiff discussed the letter with his partner, Detective Joseph Link. Link warned plaintiff that any detective who investigated the charges in the letter might be

transferred. He based this remark on the fact that other VCD detectives had been transferred for conducting an investigation that led to the arrest of the brother of the deputy police chief. Nevertheless, plaintiff and Link decided that plaintiff should bring the letter to the attention of their immediate superior, although they believed that doing so would result in the matter going up the chain of command, which gave them some concern.

Plaintiff showed the letter to Lieutenant Robert Stelter who read it and said something to the effect of what district did plaintiff want to be transferred to. Stelter testified that he made this comment mostly as a joke, but that the comment referred to the widespread belief in the Department that officers involved in investigations relating to Jones or to his command staff were transferred. Stelter's comment reinforced plaintiff's reluctance to investigate the matter himself, and he told Stelter that he thought that the matter should be referred to an outside agency. In response to Stelter's request, plaintiff gave Stelter a copy of the letter so that Stelter could forward it to Captain Kenneth Meuler. Meuler instructed Stelter to direct plaintiff to interview the informant and write a report on the interview, which Stelter did. Plaintiff complied with this directive.

Plaintiff interviewed Mullins who identified the public official whose spouse allegedly frequented the drug house as a City of Milwaukee alderman and the spouse as a man named John Odom. The informant also stated that Odom had said that he was a good friend of Jones. Plaintiff then wrote a "matter of" memorandum about the interview and gave it to Stelter, who then reviewed it with Meuler. On May 18, 2000, Meuler transmitted plaintiff's memorandum and other information about the matter to Deputy

Chief Ray along with Meuler's recommendation that the matter be referred to an outside agency. Ray reviewed the information and expressed disagreement with the recommendation to refer the matter outside and said that the Chief was not going to be happy. Ray then gave the material to Jones.

Shortly after receiving the material, Jones summoned Meuler into his office and discussed the matter with him. Jones told Meuler that he was not authorized to refer an investigation to an outside agency, and that he should have given the information to Jones sooner. Jones also said that his authority was being undermined, and that the case was similar to the one where officers were transferred after investigating drug activity by Ray's brother. Jones also asked "who the hell was Detective Delgado to think he would investigate this?" (Pl.'s Findings of Fact ("PFOF") ¶ 105.) Finally, Jones said that Meuler should not talk further to plaintiff about the matter, and that plaintiff would be transferred. On May 19, Jones signed the order transferring plaintiff retroactive to the previous day. In addition to being transferred, plaintiff lost vacation days.

The parties disagree about who in the Department was authorized to refer an investigation to an outside agency. Jones testified that he believed that he was the only person with such authority but did not identify any regulation addressing the issue. Meuler testified that he was unaware of any Department policy on the subject but believed that he was authorized to make such a recommendation. He further testified that plaintiff would not normally be authorized to make such a referral but could do so if following the chain of command would compromise

an investigation. Ray testified that any officer could make such a referral.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." *Id.*

Although summary judgment is a useful tool for isolating and terminating factually unsupported claims, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986), courts should act with caution in granting summary judgment, *Anderson*, 477 U.S. at 255. When the evidence presented shows a dispute over facts that might affect the outcome of the suit under governing law, summary judgment must be denied. *Id.* at 248.

The moving party has the initial burden of demonstrating that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Once this burden is met, the nonmoving party must "go beyond the pleadings" and designate specific facts to support each element of the cause of action, showing a genuine issue for trial. *Id.* at

322-23. Neither party may rest on mere allegations or denials in the pleadings, *Anderson,* 477 U.S. at 248, or upon conclusory statements in affidavits, *Palucki v. Sears, Roebuck & Co.,* 879 F.2d 1568, 1572 (7th Cir. 1989). Both parties must produce documentary evidence to support their contentions. *Whetstine v. Gates Rubber Co.,* 895 F.2d 388, 392 (7th Cir. 1990).

In evaluating a motion for summary judgment, the court must draw all inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). However, it is "not required to draw every conceivable inference from the record – only those inferences that are reasonable." *Bank Leumi Le-Israel, B.M. v. Lee,* 928 F.2d 232, 236 (7th Cir. 1991).

III. DISCUSSION

A. First Amendment Retaliation Claim

There are four elements to a First Amendment retaliation claim in the employment context. *Gustafson v. Jones,* 290 F.3d 895, 906 (7th Cir. 2002). First, plaintiff must establish that his speech related to a matter of public concern. *Id.; see also Connick v. Myers,* 461 U.S. 138, 147 (1983). Assuming he makes this showing, plaintiff must then prove that his speech played a substantial part in the employer's decision to take an adverse employment action against him. *Gustafson,* 290 F.3d at 906. If plaintiff carries his burden on these elements, defendants can prevail only if they can prove that the government's interest in providing services efficiently outweighed plaintiff's interest as a citizen in commenting upon matters of public concern, *id.; see also Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968);

or that they would have taken the adverse action against plaintiff even in the absence of his comments. *Gustafson,* 290 F.3d at 906.

1. Matter of Public Concern

Whether plaintiff's speech addressed a matter of public concern is a question of law for the court, although it may require predicate factual determinations to be made by the jury. *Id.* A government employee's speech relates to a matter of public concern if it "can fairly be said to relate to a matter of political, social or other concern to the community, rather than merely a personal grievance of interest only to the employee." *Id.* at 907. Whether speech addresses a matter of public concern depends upon its content, form and context as revealed by the whole record. *Id.* at 906-07 (citing *Connick,* 461 U.S. at 147-48.)

Before analyzing whether plaintiff's speech addressed a matter of public concern, it is important to identify what speech should be considered. Plaintiff contends that the speech in question includes plaintiff's statements about the matter to his superior, Stelter, and his "matter of" memorandum. Although defendants do not address the issue in their summary judgment brief, they state in their reply brief that the only speech that could have caused plaintiff's transfer was the memorandum. However, based on his conversation with Stelter, Meuler was aware of plaintiff's oral statements, and Meuler talked to Jones before Jones announced that plaintiff was being transferred. Thus, although there may be a factual issue as to what information was actually conveyed to Jones, taking the facts in the light most favorable to plaintiff, I must

assume, at this stage of the proceedings, that Jones was aware of plaintiff's statements to Stelter about the matter.

Of the three factors relevant to the matter of public concern analysis – content, form and context – content is the most important. *Id.* at 907. Defendants do not dispute that the content of plaintiff's speech related to a matter of public concern. This concession makes their argument that plaintiff's speech did not address a matter of public concern an uphill battle. "Having conceded content," defendants, like the defendants in *Gustafson* (one of whom was Jones), "face a difficult task" in demonstrating that the speech as a whole was unrelated to a matter of public concern. *Id.* at 908.

The content of plaintiff's speech clearly addressed a matter of public concern. When the Seventh Circuit considered this issue, it stated that "a communication by a law enforcement officer that contains information essential to a complete and objective investigation of serious criminal activity is 'content' that implicates public concern." *Delgado,* 282 F.3d at 517-18; *see also Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir. 1990) (stating that issues of police performance and public safety are matters of public concern). The evidence developed since then reinforces the Seventh Circuit's assessment that the content of plaintiff's speech addressed a matter of public concern. Plaintiff's statements to Stelter and his "matter of" memorandum related information indicating that the spouse of a City alderman frequented a drug house and was telling people that he was a close friend of the police chief. This information was of public concern both because it related to serious criminal activity and to the Department's handling of allegations mentioning public officials.

Defendants' argument that plaintiff's speech did not address a matter of public concern is primarily based on the form and context factors. Form and context are relevant to the question of whether speech addresses a matter of public concern because consideration of these factors ensures that every employment dispute involving a public agency does not become a constitutional issue. *Barkoo v. Melby,* 901 F.2d 613, 618 (7th Cir. 1990). Consideration of form and context often amounts to an inquiry into the speaker's motivation. *See Delgado,* 282 F.3d at 518 ("[T]he *Connick* factors of form and context . . . can be clarified by an examination of an employee's motivation."). Thus, I must "'look to the *point* of the speech in question,'" or, put differently, determine whether plaintiff sought to raise issues of public concern or simply to advance his own personal interests. *Id.* (quoting *Linhart v. Glatfelter,* 771 F.2d 1004, 1010 (7th Cir. 1985)).

The Seventh Circuit previously analyzed the question of plaintiff's motivation and concluded that his speech was designed to engender "an appropriate investigation . . . [about] a matter of public concern," rather than to further "some personal, private interest." *Id.* The evidence adduced since the Seventh Circuit made that statement reinforces the accuracy of the observation. Nothing in the record suggests that plaintiff's statements to Stelter or the "matter of" memorandum were intended to benefit him personally. On the contrary, the evidence indicates that plaintiff feared that any involvement by him in the matter might harm his career prospects in the Department. The evidence also indicates that plaintiff's apprehension was not without foundation as officers who had previously investigated politically sensitive allegations had been involuntarily transferred. *See id.*

Thus, the evidence demonstrates that plaintiff's motivations were, at least in part, those "of a well-meaning citizen." *Id.* at 519. Plaintiff did not ignore Mullins's allegations. Further, notwithstanding his concern that taking action might adversely affect him, plaintiff brought the allegations to the attention of his partner and his superior. Moreover, he recommended that the matter be investigated by an outside agency, thus, further indicating that he was motivated by a disinterested concern that the matter be handled fairly.

As part of their "form and context" argument, defendants contend that plaintiff's speech did not address a matter of public concern because it was made in the course of his assigned duties. Although statements made by public employees in the course of their duties may constitute speech on a matter of public concern, *see Bonds v. Milwaukee County,* 207 F.3d 969, 980 (7th Cir. 2000), where speech occurs in the course of the "routine discharge of assigned functions [and] where there is no suggestion of public motivation" it will not be afforded protection. *Delgado,* 282 F.2d at 519 (discussing *Gonzalez v. City of Chi.,* 239 F.3d 939 (7th Cir. 2001)). However, as discussed, the record in the present case contains considerable evidence of plaintiff's public motivation. And, although there may be unresolved factual issues that bear on the matter, on the present record, I cannot conclude that plaintiff's speech was made in the routine discharge of an assigned function.

First, I address plaintiff's statements to Stelter. Plaintiff did not speak to Stelter about the Mullins letter because he was ordered or assigned to do so. Nor does it appear that he was acting pursuant to any requirement. Rather, the evidence suggests that he discussed the matter

because he was troubled by the information in the letter and conscientiously believed that it should not be disregarded.

Defendants argue that plaintiff had no discretion as to how to deal with the information because of a department rule providing that officers should not withhold tips. (Smokowicz Supp. Aff. Attach. C, Rule 2/110.00). However, there is evidence in the record indicating that detectives assigned to VCD could initiate their own investigations without the need for directives from superiors. (PFOF ¶ 21.) Moreover, police exercise considerable discretion in determining when and how to follow up on reports of criminal activity. Wayne R. LaFave, *The Police and Nonenforcement of the Law – Part I,* 1962 Wis. L. Rev. 104, 127.

In fact, although there is conflicting testimony on the question, there is considerable evidence that plaintiff could actually have referred the matter to an outside agency. Meuler testified that plaintiff was authorized to refer information to outside agencies to avoid jeopardizing an investigation. And Ray testified that anybody in the Department could call an outside agency to pass on information about a crime. (PFOF ¶¶ 89, 90.) Defendants argue that a department rule relating to "mutual aid" (Smokowicz Supp. Aff. Attach. C, Rule 3/830.00), required that requests for assistance from other jurisdictions be made by the police chief. However, the rule clearly would not apply in the case of a referral made for the purpose of bypassing high level personnel including the chief.

Thus, based on the present record, I cannot conclude that in talking to Stelter about how to handle the Mullins letter, plaintiff was routinely discharging an assigned function. While there may be predicate issues of fact that

are, at present, not entirely resolved, I conclude that the form and context of plaintiff's speech to Stelter suggest that plaintiff was addressing a matter of public concern.

Similarly, although there also may be unresolved factual issues with respect to the circumstances of plaintiff's preparation of the "matter of" memorandum, based on the present record, I cannot conclude that the drafting and transmittal of the memorandum constituted the routine discharge of an assigned function. Although plaintiff was directed to write the memorandum, there was nothing routine about its subject or the document itself. It was hardly routine for plaintiff to write a memorandum about the spouse of an alderman who was alleged to be frequenting a drug house and bragging that the police chief was his friend. Moreover, it is reasonable to infer that it was not routine for plaintiff to be asked to write a memorandum that would immediately be sent to the police chief.

There are additional reasons why the fact that plaintiff was directed to write the memorandum did not make it any less speech on a matter of public concern. First, by complying with a directive to prepare a memorandum, plaintiff did not abandon his status as a well-meaning citizen, the characteristics of which he had previously demonstrated. The Seventh Circuit made this point when it indicated that "[t]he fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen does not change this analysis." *Delgado,* 282 F.3d at 519. Secondly, plaintiff would not have been asked to write a memorandum had he not first come forward on his own with the information in question. If a public employee initially speaks as a citizen on a matter of public concern, his speech does not

lose its protected status because his employer directs him to put it in writing. *See e.g., Branton v. City of Dallas,* 272 F.3d 730, 740 (5th Cir. 2001) (finding "context" factor to weigh in plaintiff's favor *because,* as a police officer, plaintiff had a duty to report false testimony by another officer).

For the foregoing reasons, I cannot conclude as a matter of law that plaintiff's speech did not address a matter of public concern. The content factor, which is the most important, weighs heavily in favor of plaintiff. While some predicate factual issues pertaining to the context and form factors may remain in dispute, those factors seem also to weigh in plaintiff's favor. Therefore, I must deny defendants' motion for summary judgment on this basis.

2. Motive

Assuming that plaintiff's speech addressed a matter of public concern, he must next prove that the speech played a substantial part in the employer's decision to take an adverse employment action against him. *Gustafson,* 290 F.3d at 906. The record makes clear that there are disputed issues of fact concerning defendants' motives for transferring plaintiff. Defendants contend that plaintiff was transferred because he told Mullins that the search of the drug house had been precipitated by a complaint to the Mayor's office and thereby divulged confidential information. However, defendants confine their arguments on summary judgment to whether plaintiff's speech addressed a matter of public concern. Thus, taking all facts in the light most favorable to plaintiff, a reasonable jury could find that defendants transferred plaintiff in retaliation for protected speech.

3. *Pickering* Balancing

If plaintiff's speech addressed a matter of public concern and such speech played a part in his transfer, defendants can prevail only if they can prove that the government's interest in providing services efficiently outweighed plaintiff's interest as a citizen in commenting upon the matters in question or that they would have transferred plaintiff even in the absence of his comments. *Gustafson,* 290 F.3d at 906; *see also Pickering,* 391 U.S. at 568.

In their summary judgment filings, defendants do not make a *Pickering* argument. However, even if they had, the record suggests that the *Pickering* balancing process would favor plaintiff. In conducting the *Pickering* analysis, courts typically consider seven factors:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.

Gustafson, 290 F.3d at 909. In the present case, of the above factors which are most applicable, all appear to weigh in plaintiff's favor. There is no evidence that plaintiff's statements to Stelter or his "matter of" memorandum would have created problems of discipline or harmony.

Plaintiff conveyed the information in a manner that was professional and deferential and in an appropriate time and place. He did nothing that was disruptive or potentially disruptive. Further, plaintiff's speech did not suggest disloyalty, give superiors cause to lose confidence in him, or impede his ability to perform his job duties.

B. Qualified Immunity

Defendant Jones argues that summary judgment must be granted based on qualified immunity. Under the doctrine of qualified immunity "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The test for determining whether public official defendants are entitled to qualified immunity is an objective one. *See id.; Triad Assocs., Inc. v. Robinson,* 10 F.3d 492, 496 (7th Cir. 1993). In *Saucier v. Katz,* 533 U.S. 194, 201 (2001), the Supreme Court explained the methodology to be used in addressing the issue of qualified immunity. The initial inquiry is whether, taking the facts in the light most favorable to the party asserting the injury, the facts alleged show that a constitutional right was violated. *Id.* at 201. The second step is to ask whether the right was clearly established. *Id.*

Defendants argue that no constitutional right was violated because plaintiff's speech did not address a matter of public concern. As previously stated, the question of whether plaintiff's speech addressed a matter of public concern is one to be decided by the court, although

it may require predicate factual determinations by the jury. Further, as I have indicated, it is possible that factual issues, which could affect the legal conclusion that I reach, remain. However, based on the present record, for the reasons I have stated, I cannot conclude that plaintiff's speech did not address a matter of public concern. Thus, taking the facts in the light most favorable to plaintiff, plaintiff can establish that a constitutional right was violated.

Defendants do not dispute that, at the time of plaintiff's transfer, it was clearly established that a public employer could not retaliate against an employee for exercising his First Amendment rights. *Delgado,* 282 F.3d at 520; *see also Gustafson v. Jones,* 117 F.3d 1015, 1021 (7th Cir. 1997) ("It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position.").

For the above reasons, at this point in the proceeding, Jones's invocation of qualified immunity fails.

C. Municipal Liability Claim

The City argues that plaintiff's claim against the City must be dismissed because plaintiff's First Amendment claim fails. However, as indicated, based on the present record, I cannot conclude that plaintiff's speech did not address a matter of public concern. Thus, the City's request to be dismissed as a defendant must be denied.

IV. CONCLUSION

For the above reasons,

IT IS ORDERED that defendants' motion for summary judgment is **DENIED**.

Dated at Milwaukee, Wisconsin, this 11 day of August, 2003.

/s/ Lynn Adelman
LYNN ADELMAN
District Judge

Deposition of Octavio Delgado, 7/24/2002

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

OCTAVIO DELGADO,

Plaintiff,

Case No. 00-C-0917

vs.

POLICE CHIEF ARTHUR JONES,
DEPUTY CHIEF MONICA RAY,
CITY OF MILWAUKEE,

Defendants.

Deposition of OCTAVIO DELGADO

Wednesday, July 24, 2002

9:29 a.m.

at

Rettko Law Offices S.C.
150 North Sunny Slope Road
Brookfield, Wisconsin

Reported by Sandra K. Nelson, RPR

* * *

[97] A I couldn't. My investigation was stopped. I was transferred while on vacation. I was kicked out of my office. I couldn't go back.

Q You were ordered to talk to Miss Mullins, right?

A On May 10th, yes, I was ordered. Yes, I was.

Q Who ordered you to talk to her?

A Lieutenant Stelter per Captain Meuler.

Q In essence the order came from Captain Meuler that you and Link should talk to Mullins?

A Yes. I was told specifically to ask questions regarding Chief Jones and any illegal activity and to explain this letter, to debrief, if you will, Miss Mullins.

Q Were you told – were you specifically ordered just to focus your debriefing on that part of the letter?

A The letter, the entirety –

Q The entirety of the letter?

A Yes, but I was also asked and told to specifically ask questions regarding Chief Jones.

Q Okay. And so you were specifically ordered basically two things, one, follow up on this letter with her; and two, in particular follow up about Chief Jones; is that fair?

A Yes.

Q And those were – is that – maybe not word for word, [98] but is that the gist of what Stelter told you Meuler was ordering you to do?

A Yes.

Q And you were doing this only because you were being ordered, right?

A Yes.

Q Your preference, is it fair to say – let me just get this since I think you answered the question. Your preference at that point would have been to pass this letter off saying I don't want anything more to do with this Mullins

woman, this ought to go outside the division right now, I shouldn't be involved at all, right? Is that fair to say?

A The only reason I would say that was to be fair to all parties involved, because one should not investigate their own boss. That's just not proper. And we're talking about certain people who are in politics or who have some status in this community, and you don't want to taint their reputation as well as mine that was, but – and the public here needed – this needed to be investigated because of the allegations there was a public concern here, and I would rather have it go to an outside agency to be fair to all parties involved.

Q Okay.

[99] A Including myself.

Q But the moral of the story here is, regardless of all of this, Meuler was ordering you to continue this investigation in spite of your feelings that you shouldn't be involved anymore, right?

A Yes.

Q You would not have done this but for Meuler's order? You would not have talked to Miss Mullins but for Meuler's order, right?

A Right. Once I gave it to Lieutenant Stelter, if he kept it, it went up the chain of command or to an outside agency, I would keep quiet regarding the information and say no more, and I would hope that it would be investigated.

Q But in your mind at least, it would have been, doesn't belong in my hands, good riddens, I'm glad it's gone, it should be in somebody else's hands?

MR. RETTKO: Objection. Argumentative in nature. Subject to, you can answer.

BY MR. SMOKOWICZ:

Q Don't take me wrong. What I'm trying to get at here, just to make sure we understand this all correctly, as far as you were concerned, it shouldn't have been with you anymore at all?

A I am able to investigate this complaint, okay? It

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

OCTAVIO DELGADO,

Plaintiff,

Case No. 00-C-917

v.

POLICE CHIEF ARTHUR JONES,
DEPUTY CHIEF MONICA RAY,
and CITY OF MILWAUKEE,

Defendants.

DEPOSITION of MARILYN FRANCIS, taken at the instance of the Plaintiff, under and pursuant to the provisions of the Federal Rules of Civil Procedure and the acts amended, before me, MICHELLE HAGEN, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at the Office of the City Attorney, 200 East Wells Street, Room 800, City Hall, Milwaukee, Wisconsin, on the 7th day of January, 2003, commencing at 9:05 o'clock in the forenoon.

* * *

[16] that's where he's been. As far as temporary assignments in Internal Affairs, I'm not sure of that time frame.

Q What kind of day-to-day issues would you bring to the lieutenants in the Vice Control Division of the Milwaukee Police Department from May 2000 to October 2000?

A Well, pretty much any – the same issues that I would have brought at any time. If we needed uniformed personnel to assist in some assignments, that would have

to be done through a lieutenant. It was pretty much things of that nature. And for permission to go out of town, things like that.

Q Is there any investigation from May 2000 to October 2000 that you did not raise with a lieutenant of the Milwaukee Police Department assigned to the Vice Control Division?

A Excuse me?

MR. RETTKO: Can you read that one back and I'll try to clarify.

(The last question was read.)

THE WITNESS: Yes.

BY MR. RETTKO:

Q Which, if any, investigations would those have involved?

[17] A Well, I received an investigation, an assignment from the deputy chief, Monica Ray, involving a drug complaint involving John Odom that I reported directly to her with the results of that investigation.

Q Is there any reason that you would have bypassed your lieutenants at the Vice Control Division in reporting your findings on that investigation?

A The only reason I have is that that's what I was instructed to do.

Q Is there any other investigation you were ever involved with in the HIDTA task force that you were instructed not to report back to your lieutenants at the

Vice Control Division on the Milwaukee Police Department?

A Well, any investigation that I received from the deputy chief, I reported back to the deputy chief with any results.

Q How many other investigations has Deputy Chief Monica Ray given to you other than the investigation into John Odom?

A I can think of one in particular, one other investigation, and there were others, you know. I just – I don't recall what the specifics of the investigations were.

* * *

[21] investigation. It may not have been the same day, but it was early into the investigation.

Q Do you have any general time periods?

A Probably within a week.

Q Within a week of what?

A Of receiving the assignment.

Q Do you recall when you received the assignment?

A May 22nd of 2000.

Q And how is it that you recall the date you received the assignment from Deputy Chief Ray on May 22nd?

A I looked at reports that I had written.

Q So you reviewed some reports prior to today's deposition?

A Yes.

Q What reports did you review prior to today's deposition?

A Well, I briefly looked at some matter ofs that I wrote regarding the investigation.

Q So you've had the opportunity to review matter ofs that you wrote at least at a minimum prior to today's deposition.

A Yes.

Q Now, in reporting your investigation to – now, when Deputy Chief Ray assigned you to this on

* * *

INVESTIGATION NARRATIVE Filed # 00 242 3064

This report is being filed by Police Officer Vanessa HARRIS of the Vice Control Division (Early).

On Thursday, October 05, 2000, at 2:58, PM, Police Officers Michael WOOTEN and Ray WALKER went to 2200 N. Martin Luther King Dr. and placed John D. ODOM, black male, date of birth 09-24-46 into custody for Delivery Of A Controlled Substance that occurred on 08-03-00 at 5:15 PM, and 08-10-00 at 6:00 PM. Both deliveries occurred at 2200 N. Martin Luther King Dr. ODOM gave the Officers WOOTEN, WALKER and Captain Charles SHEPARD consent to search his apartment number 55B. No contraband was found at the residence. ODOM was conveyed to the Milwaukee Police Department for processing.

Police Officer Vanessa HARRIS

Vice Control Division
59959

(2)

Supreme Court, U.S.
FILED
AUG 5 - 2004
OFFICE OF THE CLERK

No. 04-24

In The
Supreme Court of the United States

ARTHUR JONES, Chief,

Petitioner,

v.

OCTAVIO DELGADO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

William R. Rettko
Counsel of Record
Rettko Law Offices, S.C.
15430 W. Capitol Drive, Suite 200
Brookfield, WI 53005-2621
(262) 783-7200
Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

Whether the First Amendment protects a police detective's speech on a matter of public concern?

Whether a reasonably competent public official believed he was free to retaliate by transferring a detective to an unwanted and less desirable job position based on the detective's communication that was highly relevant to an independent and objective investigation of criminal activity that could result in the official being questioned as a part of the criminal investigation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. This Court has Previously Defined First Amendment Protection for Speech that is Part of a Public Employee's Duties 7

II. The Seventh Circuit Rejected Jones' Request for Qualified Immunity Based on Clearly Established Law that his Conduct was Unlawful in the Situation He Confronted 20

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) 9

Branton v. City of Dallas,
272 F.3d 730 (5th Cir. 2001).....12, 13

Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.,
149 F.3d 971 (9th Cir. 1998).....16, 20

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).... passim

Cockrel v. Shelbey County Sch. Dist.,
270 F.3d 1036 (6th Cir. 2001).....8, 15

Connick v. Myers, 461 U.S. 138,
103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ..... passim

Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002) ..... passim

Delgado v. Jones,
277 F.Supp.2d 956 (E.D. Wis. 2003)..... passim

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998).....25

Dirrane v. Brookline Police Dept.,
315 F.3d 65 (1st Cir. 2002).....24

Flores v. Morgan Hill Unified Sch. Dist.,
324 F.3d 1130 (9th Cir. 2003).....21

TABLE OF AUTHORITIES -- Continued

Gilbrook v. City of Westminster,
177 F.3d 839 (9th Cir. 1999).....17

Glass v. Dachel, 2 F.3d 733 (7th Cir. 1993) 9

Gonzalez v. City of Chicago,
239 F.3d 939 (7th Cir. 2001)..... passim

Gustafson v. Jones,
117 F.3d 1015 (7th Cir. 1997).....22, 23, 27

Gustafson v. Jones, 290 F.3d 895 (7th Cir. 2002).....8, 9

Hope v. Pelzer, 536 U.S. 730,
122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) 21, 27

Hufford v. McEnaney, 249 F.3d 1142 (9th Cir. 2001) 16

Johnson v. Multnomah County,
48 F.3d 420 (9th Cir. 1995).....16

Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) 27

Koch v. City of Hutchinson,
847 F.2d 1436 (10th Cir. 1988).....11

Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985) 10

Mitchell v. Forsyth,
472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).....20

Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998).....12, 23

TABLE OF AUTHORITIES -- Continued

Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 15, 16

Rivera-Jimenez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004)..... 27

Rivero v. City & County of San Francisco, 316 F.3d 857 (9th Cir. 2002)..... 16

Roth v. Veteran's Admin. of the United States, 856 F.2d 1401 (9th Cir. 1988)..... 16

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001) 20

Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000)..... 25

Taylor v. Keith, 338 F.3d 639 (6th Cir. 2003)..... 14, 15

Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992)..... 13, 14

Weeks v. Bayer, 246 F.3d 1231 (9th Cir. 2001)..... 17

STATEMENT OF THE CASE

Respondent finds that petitioner's statement of the case does not contain a complete listing of the facts necessary to decide the petitioner's writ of certiorari, and now adds facts necessary to decide this petition. This is a case in which a police detective claims the City of Milwaukee's Police Chief violated his First Amendment rights by transferring him to an unwanted and undesirable position after the detective disclosed information from a letter he received from an arrested individual that disclosed the police chief was a close personal friend of a public official whose immediate relative was alleged to have frequented the arrested individual's drug house.

Respondent, Detective Octavio Delgado, began serving in the Milwaukee Police Department's Vice Control Division ("VCD") in 1998 where he was assigned as an undercover narcotics investigator. (Pet. App. 22). On March 22, 2000, a citizen complained to the City of Milwaukee Mayor's office about the existence of an alleged drug house located on West Wright Street. (Id.) The Mayor's office forwarded the citizen's complaint to VCD for investigation. (Id.)

In late April 2000, Delgado, as part of a drug entry team, searched the alleged drug house pursuant to a warrant. (Id.) During the search of the house, several individuals were arrested including a woman named Margaret Mullins. (Id.)

In May 2000, Mullins sent a letter specifically addressed to Delgado. Letters specifically addressed to VCD detectives are only opened by those detectives. (Record 46, at ¶ 2; Record 47, at ¶¶ 8-9; Record 53, Stelter Dep., pp. 40-

41). In this letter, Mullins said she had information about unlawful drug-related activity, including information about public school employees engaging in drug trafficking, a state employee living with a drug dealer, and the patronage of a drug house by a close relative of a public official. (Pet. App. 22) Mullins also stated that the public official whose close relative frequented the drug house was a close personal friend of the City of Milwaukee's Police Chief, Petitioner Arthur Jones. (Id.)

Delgado recognized that these allegations were sensitive because of the references to a public official and to Jones, but believed they should be investigated. (Id.) Delgado did not want to personally investigate this matter as he thought the investigation could best be accomplished by an outside law enforcement agency. (Id.) Had Delgado thrown away Mullins' letter at this point, no one would have known of its existence except for Mullins and Delgado. (Record 53, Stelter Dep., pp. 41-42). Further, Mullins had no access to a copy machine so had she claimed she sent a letter to Delgado that was not responded to, it would have been her word against his. (Id., at 41-43).

Nonetheless, Delgado discussed the Mullins letter with his partner, Detective Joseph Link, to get ideas on how to proceed forward with an investigation on Mullins' allegations. (Record 46, at ¶¶ 4,6). Link warned Delgado that any detective who investigated the charges in the letter might be transferred. (Pet. App. at 22-23). Link based his remarks on the fact that other VCD detectives were transferred for conducting an investigation that led to the arrest of the brother of the Deputy Police Chief. (Id., at 23). Delgado and Link decided that Delgado should bring the letter to the attention of their immediate supervisor knowing that by doing so the matter would go up the chain of command

which caused them concern. (Id.) Had Delgado decided to throw away the Mullins letter at this point, no one in the MPD would have known about Mullins' allegations except Delgado and Link. (Record 46, at ¶ 7; Record 47, ¶ 13).

Delgado then showed the Mullins letter to Lt. Stelter who read it and said something to the effect of what district did Delgado want to be transferred to. (Pet. App. 23). Stelter made this comment mostly as a joke, but referred to the widespread belief in the department that officers involved in investigations relating to Jones or to his command staff were transferred. (Id.) Lt. Stelter's comment reinforced Delgado's reluctance to investigate the matter himself and he told Stelter the matter should be referred to an outside agency for investigation. (Id.)

Stelter then requested that Delgado give him the Mullins letter so he could forward it to Captain Kenneth Meuler. (Id.) Upon receipt of the Mullins letter, Captain Meuler instructed Lt. Stelter to direct Delgado to interview Mullins and to write a report on the interview. (Id.) Stelter complied with Meuler's orders resulting in Delgado's compliance with these directives. (Id.)

Delgado then interviewed Mullins who identified the public official whose spouse allegedly frequented the drug house as a City of Milwaukee Alderman whose spouse was named John Odom. (Id.) The informant confirmed that Odom told her he was a good friend of Jones. (Id.) In addition, Delgado learned the identity of the Milwaukee public school teachers alleged to be using crack cocaine and marijuana, together with the identity of the individual who lived with the Assistant District Attorney and alleged to be selling crack cocaine in the City of Milwaukee. (Record 46, at ¶ 12; Record 47, at ¶ 17). Delgado kept notes concerning

this interview. (Record 53, at Dep. Ex. 3; Delgado Dep., pp. 101-103). After completing his interview of Mullins, Delgado completed a "Matter Of" report from the notes of his interview with Mullins for Captain Meuler. (Record 53, Delgado Dep., pp. 100-103). At no time prior to the start of this lawsuit, did Lt. Stelter or any of Delgado's superiors inspect his notes from his interview of Mullins. (Record 53, Stelter Dep., pp. 50-51).

Delgado then gave his "Matter Of" to Lt. Stelter who forwarded it to Captain Meuler. (Pet. App. 23). Captain Meuler then referred Delgado's "Matter Of" to Deputy Chief Ray along with his recommendation that the matter be referred to an outside agency for investigation. (Id., at 23-24). Deputy Chief Ray reviewed the information and expressed her disagreement with Meuler's recommendation and told Meuler that Jones would not be happy. (Id., at 24). Deputy Chief Ray then requested that Meuler provide her additional reports and the meeting ended with Deputy Chief Ray leaving to go to Jones' office with the reports provided by Captain Meuler. (Record 53, Meuler Dep., pp. 42-43).

Approximately two minutes after Captain Meuler left Deputy Chief Ray's office, he received a telephone call from Chief Jones demanding he go to the Chief's office. (Id., at 44). As Captain Meuler entered Jones' office, Jones was holding the reports provided to him by Deputy Chief Ray which the Chief used to point at Meuler and screamed, it was not for Meuler to decide if an investigation got referred to an outside agency, and that Meuler had no business making that recommendation or not giving the Chief this information sooner. (Id., at 44-45). Jones then screamed at Meuler that he believed Meuler was undermining his authority and referenced that this situation was similar to the one where officers were transferred after investigating drug activity by

Deputy Chief Ray's brother. (Pet. App. 24). Jones then asked Meuler, "Who the hell was Detective Delgado to think he would investigate this?" (Id.) Jones then told Captain Meuler that no one from the VCD should be involved in the investigation and he should turn over all reports concerning this investigation to Commander Schunk of the Internal Affairs Division ("IAD") who would handle the investigation. (Record 53, Meuler Dep., p. 49). Jones then told everyone in the room he was transferring Delgado and ordered Captain Meuler not to talk to Delgado about the transfer or to discuss the investigation and the citizen complaint against John Odom. (Id., at 50). Jones then ordered Captain Meuler not to talk to anyone about this investigation and made it clear it was his decision Delgado was to be transferred and the decision was done and over with. (Id., at 50-51, 55).

Commander Schunk of IAD recalled that Jones was angry that the information contained in Mullins' letter and Delgado's "Matter Of" was not brought to his attention sooner because of the allegations of criminal misconduct and the fact his name was mentioned in the report. (Record 53, Schunk Dep., pp. 36-39). After Meuler left Jones' office on May 18, 2000, Jones ordered Schunk to get detectives from IAD to interview Mullins. (Id., at 42). Schunk and IAD Criminal Investigation Unit detectives then interviewed Mullins at the Milwaukee County Jail. (Id. at 44-45). After completing this interview, Jones instructed Schunk to begin an internal rules investigation against Delgado. (Id., at 45-46). On May 19, 2000, Jones issued a written order transferring only Delgado retroactive to May 18, 2000. (Record 53, at Dep. Ex. 6).

On June 20, 2000, Captain Gregory Thompson of IAD found that the investigation into Mullins' allegations

that Delgado made mention of the Mayor's office while interrogating Mullins did not result in a violation of any confidentiality matter as Delgado did not divulge any specific names of complainants or witnesses. (Record 53, at Dep. Ex. 9).

Then on June 29, 2000, Delgado filed his Complaint in the United States District Court for the Eastern District of Wisconsin. (Record 1). On July 28, 2000, Commander Schunk ordered members of IAD to continue the investigation into Delgado for violating the MPD's confidentiality rule. (Record 53, at Dep. Ex. 13, p. 10).

On October 17, 2000, defendants filed a motion to dismiss Delgado's Complaint. (Record 20). In doing so, defendants claimed Delgado's Complaint failed to state a First Amendment claim arguing his speech was not protected as a matter of public concern, and alternatively, that Chief Arthur Jones and Deputy Chief Monica Ray were entitled to qualified immunity. (Record 21). On February 13, 2001, defendants' motion to dismiss was denied. (Record 31). Police Chief Arthur Jones and Deputy Chief Ray then filed an appeal requesting that the Seventh Circuit find Delgado's speech was not protected by the First Amendment and they were entitled to qualified immunity. (Record 32).

On March 8, 2002, the Seventh Circuit affirmed the district court's decision to deny defendants' motion to dismiss. Delgado v. Jones, 282 F.3d 511 (7th Cir. 2002); (Pet. App. 4-20). The defendants then filed a motion for rehearing and rehearing en banc which was denied by the Seventh Circuit on May 2, 2002. At the conclusion of the discovery in this case, Detective Delgado agreed to stipulate to the dismissal of Deputy Chief Monica Ray as a defendant. (Record 43). However, the remaining defendants, Police

Chief Arthur Jones and the City of Milwaukee filed a motion for summary judgment requesting dismissal of Delgado's complaint on the basis that Delgado's speech was not protected under the First Amendment and that Jones was entitled to qualified immunity. (Record 41-42). On August 11, 2003, the district court denied the defendants' motion for summary judgment. Delgado v. Jones, 277 F.Supp.2d 956 (2003). On September 10, 2003, Jones filed another appeal with the Seventh Circuit requesting reversal of the district court's denial of his motion for summary judgment arguing that Delgado was not entitled to First Amendment protection and that he was entitled to qualified immunity. (Record 62). On April 1, 2004, the Seventh Circuit Court of Appeals issued an order affirming the district court's denial of the defendants' motion for summary judgment. (Pet. App. 1-3).

Jones now files his petition claiming Delgado is not entitled to First Amendment protection as his speech arose out of his official duties as a public employee, and he is entitled to qualified immunity.

REASONS FOR DENYING THE WRIT

I. This Court has Previously Defined First Amendment Protection for Speech that is Part of a Public Employee's Duties.

This court has held:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters *only* of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the

> wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.
>
> Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). (emphasis added).

The petitioner argues that the various circuit courts have taken this holding and inconsistently applied it requiring this Court to review this case to provide further definition as to what this Court meant when it said a public employee's speech as a citizen upon matters of public concern is protected.

However, the petitioner's request for review is misplaced because, "the key question is not whether a person is speaking in his role as an employee or citizen, but whether the employee's speech in fact touches on a matter of public concern." Cockrel v. Shelbey County Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001). The issue is whether a public employee is speaking on a matter of public concern versus matters of personal interest. Connick, 461 U.S. at 147, 103 S.Ct. 1684.

As a general rule, "[a] government employee's speech relates to a matter of public concern if it, 'can fairly be said to relate to a matter of political, social or other concern to the community, rather than merely a personal grievance of interest only to the employee.'" Delgado v. Jones, 277 F.Supp. 2d 956, 960 (E.D. Wis. 2003); *citing* Gustafson v. Jones, 290 F.3d 895, 907 (7th Cir. 2002). To determine if the speech is on a matter of public concern is dependent on its "content, form and context of [the speech] as revealed by the whole record." Gustafson, 290 F.3d at

906-907; *citing* Connick, 461 U.S. at 147-48. From this general rule, the Seventh Circuit has found content involving speech on "police protection and public safety are generally matters of public concern." Delgado v. Jones, 282 F.3d 511, 517 (7th Cir. 2002); see Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc). More specifically, "[I]t would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." Id. Further, "speech that focuses on police departments (and ultimately police protection and public safety) involve matters of great public concern." Delgado, 282 F.3d at 517, *citing* Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993).

The petitioner complains the Seventh Circuit's general determinations on content as applied to Delgado has the potential for sweeping almost anything a police officer says during the course of their duties as being protected by the First Amendment. However, petitioner did not dispute the content of respondent's speech related to a matter of public concern in filing his motion for summary judgment with the district court. Delgado, 277 F.Supp. 2d at 961. Instead, at summary judgment, petitioner focused on a "form and context" argument contending that Delgado's speech did not address a matter of public concern as it was made in the course of his assigned duties. Id. What petitioner really wants by petitioning this Court is for this Court to establish a per se rule exempting statements made in the course of a police officer's official duties from the protection of the First Amendment.

The Seventh Circuit recognized petitioner's request from the start. Delgado, 282 F.3d at 519-20. The petitioner again disguises this request by arguing that the Seventh Circuit's decision in Gonzalez v. City of Chicago, 239 F.3d

939 (7th Cir. 2001), is in conflict with the Delgado decision, and that various other decisions by other circuit courts concerning the speech of a public employee conducting routine duties creates confusion on what speech is considered routine versus non-routine. By doing so, the petitioner argues this Court must define that speech which is routine versus non-routine. This is despite the fact this Court's analysis is to determine if the speech is on a "matter of public concern," not whether it was "routine" or "non-routine."

As such, the petitioner's argument focuses incorrectly on the phrase "routine." This Court has set forth factors to determine the "form and context . . . can be clarified by an examination of an employee's motivation." Delgado, 277 F.Supp.2d at 961. More specifically, under the Connick inquiry, this requires the lower courts "to look to the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or was the point to further some purely private interest?" Delgado, 282 F.3d at 518, *citing* Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985).

Therefore, in opposite to petitioner's argument that the Seventh Circuit's decisions in Gonzalez and Delgado cannot be easily distinguished, this court's inquiry set forth in Connick concerning an employee's motivation already provides lower courts with a uniform procedure to evaluate an employee's speech based on form and context. Moreover, the Seventh Circuit correctly followed the Connick inquiry. More specifically, in Gonzalez, the employee's speech was a routine duty that did not touch on a matter of public concern because his speech was "'clearly acting *entirely* in an employment capacity when he made those reports,' Gonzalez, 239 F.3d at 941 (emphasis added), and that he 'could have been fired had he *not* produced the reports.' Id.

at 942 (emphasis added)." Delgado, 282 F.3d at 518-19. In short, it was not Gonzalez' point to bring wrongdoing to light, but to further a purely private interest in keeping his job by performing his duty. In reaching this conclusion, the Seventh Circuit concluded that an employee's speech or expression in addition to objectively promoting or protecting a matter of public concern must also be a product of some independent discretion or judgment showing there was some motive on the part of the employee to bring wrongdoing to light. Id. at 519, *citing* Gonzalez, 239 F.3d at 941. In making this distinction, the Seventh Circuit clarified in Gonzalez that, "we are not 'establishing a per se rule exempting statements made in the course of official duties from the protection of the First Amendment.'" Id., *citing* Gonzalez, 239 F.3d at 942; (*quoting* Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988)).

In comparison, the Seventh Circuit determined Delgado's actions were not a routine discharge of an assigned duty as the petitioner himself said Delgado should not have been investigating the matter in question. (Pet. App. 2). Further, the Seventh Circuit found Delgado exercised a great deal of discretion because he decided to bring the matter up with his supervisor in the first place which was not the usual process, he decided to show a supervisor the actual letter he received instead of simply summing it up and omitting information in relation to petitioner, and he recommended to his supervisor that an independent investigation be conducted. Id. More specifically, Delgado was troubled by the information contained in Mullins' letter and he took steps to bring the allegations to light with his superiors because he believed the matter should not simply be disregarded. Delgado, 277 F.Supp.2d at 962. (Pet. App. 30-31).

The difference between Delgado and Gonzalez is that Gonzalez wrote his reports with no purpose in mind other than to comply with his duties. Delgado, 282 F.3d at 518-19. (Pet. App. 15). Delgado disclosed Mullins' information for the purpose it was on a matter of public concern and should be investigated. Id. Further, Delgado made this disclosure although he had discretion to not investigate the information and no one would have been the wiser of it. Delgado, 282 F.3d at 519. (Pet. App. 15-16). Contrary to petitioner's position, Delgado and Gonzalez are distinguishable and both decisions are in conformity with the mandates of Connick.

Likewise, petitioner's argument that the Eleventh Circuit's decision of Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998), is in conflict with Delgado, and therefore, requires this Court's intervention is misplaced. In making this argument, petitioner claims it is impossible to distinguish Delgado's from Morris' discharge of duties. However, the evidence in Morris showed that a sheriff's deputy generated an accident report out of the normal course of his duties as an accident investigator without any indication it was his point to bring wrongdoing to light versus to further some purely private interest in conducting his routine duties. Delgado, 282 F.3d at 520; (Pet. App. 18-19). In comparison, Delgado had discretion to disclose and chose to do so, and Jones knew that when he chose to act with an undesirable transfer for Delgado. (Pet. App. 2-3).

Moreover, petitioner's argument that Branton v. City of Dallas, 272 F.3d 730 (5th Cir. 2001) is another example of a circuit court's decision being at odds with this Court because First Amendment protection was given to a police officer for speech occurring on the job is incorrect. This Court's precedence establishes that when a public employee speaks on a matter of public concern, they may be entitled to

First Amendment protection. Connick, 461 U.S. at 147. The Fifth Circuit recognized this in Branton and reviewed Branton's speech based on its content, form and context as required by Connick. Branton, 272 F.3d at 739-40. Petitioner's argument that this Court prohibits an employee's speech from ever rising to the level of speaking "as a citizen" is contrary to what this Court dictates in Connick. Moreover, to adopt such a policy has the possibility of swallowing the First Amendment's safeguard that currently allows information to reach the public debate to check government agencies.

Petitioner next argues the Sixth Circuit dismissed a fraud investigator's First Amendment claim because his speech was not protected as he was acting in the course of his employment in speaking with outside investigators. However, the Sixth Circuit dismissed the fraud investigator's First Amendment claim because his speech on the investigation was confidential, and he was previously warned by his supervisor not to pursue the matter without going through appropriate department procedures concerning his duties as an employee. Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir. 1992). The truth is, the fraud investigator had an opportunity to file an appropriate complaint by following department procedures, but declined to file any complaint. Id., at 1019. In contrast, respondent had discretion to disclose information about potential crimes, and after doing so followed all department procedures, but was still retaliated against by petitioner. Delgado, 277 F.Supp.2d at 964. (Pet. App. 35). More specifically, respondent "conveyed the information in a manner that was professional and deferential and in an appropriate time and place." Id.

Additionally, petitioner's argument the Sixth Circuit further confuses whether a public employee has the right to free speech based on activities arising from their job is inaccurate. In Taylor v. Keith, 338 F.3d 639 (6th Cir. 2003), the Sixth Circuit evaluated whether Taylor's speech was on a matter of public concern by following the well-established factors set forth by this court in Connick. Taylor, 388 F.3d at 644. More specifically, the Sixth Circuit acknowledged, "[W]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole." Id., *citing* Connick, 461 U.S. at 147-48, 103 S.Ct. 1684. As such, because Taylor's speech was on alleged police brutality, a matter of inherent public concern, and was for the purpose to bring to light actual or potential wrongdoing or a breach of public trust, it was protected. Id.

In contrast, the Sixth Circuit in Taylor distinguished the defendants' reliance upon Thomson that when a public employee speaks in his role as a public employee, his speech cannot touch on a matter of public concern. Id. What petitioner ignores is that the Sixth Circuit in Taylor, pointed out that in its prior decision in Thomson that, "[n]ot all matters discussed within a government office are of public concern, and thus internal office communication does not *necessarily* give rise to a constitutional claim." Id., *citing* Thomson, 977 F.2d at 1020-21. (emphasis added). However, this:

> [D]id not purport to strip public employees of the First Amendment's protection for all speech that occurs in the course of employment. Rather, Thomson simply implies that the context of the speech (i.e., whether an employee speaks in the course of

> his employment) is relevant to, but not determinative of, whether the speech touches on a matter of public concern.

Id., at 644-45.

The Sixth Circuit then went on to state, "a public teacher's speech, made in the role of employee, is protected so long as the speech itself addresses a matter of public concern." Id., at 645, *citing* Cockrel, 270 F.3d at 1052. In making this distinction, the Sixth Circuit recognized, "that the Supreme Court made clear in Connick that 'the key question is not whether a person is speaking in his role as an employee or citizen, but whether the employee's speech in fact touches on a matter of public concern.'" Id. As such, the Sixth Circuit joins with the Seventh Circuit in rejecting the same argument petitioner makes requesting this Court to set guidelines limiting First Amendment protection for speech that is part of a public employee's duties. To the contrary, this Court has already established the guidelines to analyze whether a public employee's speech is on a matter of public concern, as was recognized by the Seventh Circuit in this case. Delgado, 282 F.3d at 519-520. (Pet. App. 14-17).

Similarly, petitioner's reliance upon Judge O'Scannlain's concurring opinion in Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004) ignores that the majority applied:

> [A] two-step test that stems from the Supreme Court's holdings in Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and Pickering v. Bd. of Educ., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968): (1) we ask whether the

> speech addresses a matter of public concern, and, if it does, (2) we engage in an inquiry, commonly known as the Pickering balancing test, . . .

Ceballos, 361 F.3d at 1173, *citing* Rivero v. City & County of San Francisco, 316 F.3d 857, 865 (9th Cir. 2002) (quoting Hufford v. McEnaney, 249 F.3d 1142, 1148 (9th Cir. 2001)).

The Ceballos court then went on to determine if the public employee's speech addressed a matter of public concern by reviewing the speech in light of "the content, form, and context" of the speech. Id. In doing so, the Ceballos court stated, "[a] public employee addresses a matter of public concern when his speech relates to an issue of 'political, social, or other concern to the community.'" Id., *citing* Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist., 149 F.3d 971, 978 (9th Cir. 1998), (quoting Connick, 461 U.S. at 146, 103 S.Ct. 1684); *see also* Johnson v. Multnomah County, 48 F.3d 420, 422 (9th Cir. 1995). From there, the Ceballos court stated:

> What is critical under Connick, as we explained in Roth v. Veteran's Admin. of the United States, is the "point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"

Id., at 1174, *citing* Roth, 856 F.2d 1401, 1406 (9th Cir. 1988).

The fact petitioner makes the same argument as set forth in the concurring opinion in Ceballos is the same argument rejected by the majority in that very case. Ceballos, 361 F.3d at 1175-78. More specifically, the majority stated:

> The right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, "are positioned uniquely to contribute to the debate on matters of public concern." Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001) (quoting Gilbrook v. City of Westminster, 177 F.3d 839, 870 (9th Cir. 1999)). Stripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations.

Id., at 1175.

The majority in Ceballos, recognized that the concurrence was, like the petitioner in this case, requesting a "per se" rule to prohibit First Amendment protection to employees resulting from "routine" job functions. However, the majority stated a:

> [P]er se rule stripping all First Amendment protection from speech uttered in the

> performance of routine, as opposed to non-routine, job functions would be inconsistent with the very nature of the Connick test which contains a second step that requires us to balance various factors, including some of those that concern our concurring colleague.

Id. at 1177-78.

More specifically, the majority held that:

> [R]egardless of the form in which a government worker makes charges of corruption, criminal misconduct, or public waste, such charges raise serious public concerns that merit careful assessment and justify full application of the Connick principles. Indeed, a report that would ordinarily be considered routine by virtue of its form may well become non-routine by virtue of its content, such as when it contains serious charges of official wrongdoing.

Id., at 1177.

As such, the majority in Ceballos held that, "whether a job duty is routine or non-routine is a far less important factor for purposes of First Amendment analysis than the content of the public employee's speech." Id. Further, the majority held that:

> [U]nlike our colleague, we do not perceive any "deep confusion" in the other circuits; rather, these cases point to the nearly

> unanimous opposition of the federal courts to the imposition of a per se rule denying all First Amendment protection to public employees' speech pursuant to their job-related duties.

Id.

In making this quote, the Ninth Circuit compared in part Gonzalez v. City of Chicago, 239 F.3d 939, 941-42 (7th Cir. 2001), with Delgado v. Jones, 282 F.3d 511, 519 (7th Cir. 2002).

As the Ceballos majority stated,

> [N]ot only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a per se rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other job-related obligations. Such speech, like all other public employee speech, is subject to the full two-part Connick test described above.

Id., at 1178.

Petitioner's argument amounts to a request for a per se rule and must be rejected because such a rule would be contrary to the doctrine established by this Court, and would deny First Amendment protection to public employees' speech resulting from job-related duties. If that were to occur, the very persons most knowledgeable and informed of

operations, conduct, and policies of public agencies and its officials would be silenced, and a major safeguard to prevent corruption in our democratic society would be lost. Respondent respectfully requests that this Court deny petitioner's request for such a per se rule by rejecting his Writ of Certiorari.

II. The Seventh Circuit Rejected Jones' Request for Qualified Immunity Based on Clearly Established Law that his Conduct was Unlawful in the Situation He Confronted.

This Court has held, "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151, 2156 (2001) (citing Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). From this premise the "threshold question: taken in the light most favorable to the party asserting injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. at 201, 2156. If a constitutional right is violated, then the next question is, "whether the right was clearly established." Id.

> A right is "clearly established" when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier, 533 U.S. at 202, 121 S.Ct. 2151. To determine whether qualified immunity applies, we must consider the application of the right in the specific context in question. Brewster, 149 F.3d at 977. This does not mean "that an official action is protected by qualified immunity unless the very action in

> question has previously been held unlawful," however, but rather that "in the light of pre-existing law the unlawfulness must be apparent." Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (internal quotation marks and citations omitted). Indeed, " '[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'" Id., at 741, 122 S.Ct. 2508. In order to find that the law was clearly established, then, "we need not find a prior case with identical, or even 'materially similar,' facts." Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1136-37 (9th Cir. 2003) (quoting Hope, 536 U.S. at 741, 122 S.Ct. 2508). Instead, we must "determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." Id., at 1137 (quoting Hope, 536 U.S. at 741, 122 S.Ct. 2508).

Ceballos, 361 F.3d at 1180.

As such, based on the principles set forth by this Court, the Seventh Circuit to deny petitioner qualified immunity had to find petitioner as a reasonable official understood that what he was doing violated the clearly established right as determined by preexisting law. Id. Contrary to petitioner's argument, this does not mean there must be a case identical or even materially similar to the facts he confronted, but merely means in the light of preexisting law, his unlawfulness must have been apparent to him. Id.

Nonetheless, petitioner further argues the Seventh Circuit failed to refer to any particular factual circumstance he faced in denying his request for qualified immunity. To the contrary, the Seventh Circuit specifically stated:

> Delgado was singled out by the former arrestee and given information on alleged criminal activity. Once this information was reduced to the "Matter of" memorandum, it was forwarded by Delgado's captain to Deputy Chief Ray with a recommendation that any subsequent investigation be performed by an outside law enforcement agency. Such a situation is certainly not routine. Moreover, because the subject of Delgado's communication was highly relevant to an independent and objective investigation of criminal activity and was not motivated by the personal interests of Delgado--in short, it was a matter of public concern--a public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule.

Delgado, 282 F.3d at 520-21. (Pet. App. 19).

Although petitioner complains the Seventh Circuit did not analyze the facts he confronted, it did so and applied those facts to well-established principles observing, "[I]t has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in

particular retaliation through a transfer to a less desirable position." Id. at 520, *citing* Gustafson v. Jones, 117 F.3d 1015, 1020 (7th Cir. 1997). It should also be noted that petitioner was aware of this principle, as he was a defendant in Gustafson. Delgado, 282 F.3d at 520 n. 4.

Further, petitioner's argument that the Seventh Circuit's review of the two cases he relied on to request qualified immunity is lacking in its review of the particular factual context of the cases ignores the clearly established right he violated. First, the Seventh Circuit rejected petitioner's argument that he relied upon Gonzalez, because his actions occurred about eight months before the Seventh Circuit's decision in Gonzalez thereby eliminating any possibility of his reliance on that decision. Delgado, 282 F.3d at 520. Additionally, the Seventh Circuit rejected petitioner's qualified immunity argument as relying on Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998), because

> [T]he Eleventh Circuit in Morris, also expressed concern that routine public duties should not be elevated to a protected status under the First Amendment, lest every remark by a government employee "plant the seed of a constitutional case." 142 F.3d at 1382 (quoting Connick, 461 U.S. at 149, 103 S.Ct. 1684). Although concerns of efficiency may require a safe harbor for personnel decisions that are made against the backdrop of an employee's routine job duties, this category is narrow and cannot be permitted to swallow the First Amendment. No doubt government efficiency can be equally compromised if government supervisors can freely pursue retaliation for

> speech that is politically sensitive or embarrassing.

Id. (Pet. App. 19).

In other words, a reasonable public official would know there was no per se rule excluding comments made by an employee as part of routine duty from First Amendment protection, and that a public employee's speech on a matter of public concern was protected by the First Amendment. Therefore, petitioner as a reasonable official was provided with fair warning that his conduct under these circumstances was unlawful.

Further, petitioner's reliance on Dirrane v. Brookline Police Dept., 315 F.3d 65 (1st Cir. 2002), for the premise that the First Circuit provided the defendant qualified immunity because there was no comparable previously decided case establishing defendant was acting unconstitutionally is not persuasive. To begin with, the Seventh Circuit, contrary to petitioner's argument, specifically reviewed the factual circumstances he faced. Delgado, 282 F.3d at 520-21. Additionally, the plaintiff's transfer in Dirrane occurred some five years after his alleged speech. The plaintiff's complaints were nestled in a morass of complaints, the defendants had some basis for distrusting the plaintiff's judgment, and a reasonable department head could have concluded, even if mistakenly, they were dealing with someone who would make up anything to get attention. Dirrane, 315 F.3d 67-71. Simply put, these facts unlike those in this case, do not fit under any clearly established law in which a reasonable official would have known they were violating an employee's speech on a matter of public concern.

Petitioner's argument that the Tenth Circuit's decision in Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998) reinforces a lack of clarity in approaches among the circuits on this issue is without basis. A review of Dill specifically addresses that the Tenth Circuit considered the facts set forth in the complaint with the preexisting case law and found the defendants should have known it would be unconstitutional to transfer plaintiff from detective to patrol officer and to alter his weekend duty schedule in retaliation for his speech. Dill, 155 F.3d at 1205. To argue the Tenth Circuit ignored the specific facts facing the defendants in its consideration of qualified immunity in Dill is as disingenuous as petitioner's argument the Seventh Circuit failed to consider the facts and circumstances facing him in this case.

Likewise, petitioner's reliance on Stanley v. City of Dalton, 219 F.3d 1280 (11th Cir. 2000), is distinguishable from the case at hand. In Stanley, the Eleventh Circuit found the defendant Chief had an undisputed lawful basis for terminating Stanley. Id., at 1296. In this case, petitioner did not present any undisputed lawful basis for transferring respondent to an unwanted and undesirable position. (Pet. App. 1-37). To the contrary, at his deposition, the petitioner claimed he was concerned about respondent violating a confidentiality rule of the Milwaukee Police Department by disclosing to Mullins during his interrogation of her that the police department found out about her drug house as a result of a complaint to the Mayor's office. However, petitioner's alleged concern did not come about until after he decided to transfer respondent. (Record 53, Meuler Dep., pp. 50-51, 55; Schunk Dep., pp. 45-46).

In addition, petitioner's alleged concern is a manufactured afterthought, as the record shows petitioner

questioned Captain Meuler on, "Who the hell was Detective Delgado to think he would investigate this?" (Pet. App. 24). Immediately followed by petitioner indicating to Captain Meuler and everyone else in the room that he was going to transfer Delgado. (Id.). Then following petitioner's dismissal of Meuler from this meeting, petitioner initiated a criminal investigation that later turned into an internal rules investigation against Delgado. (Record 53, Schunk Dep., 42-46) An investigation in which Captain Thompson of the Internal Affairs Division reached a conclusion on June 20, 2000 that there was no evidence of any violation of the confidentiality rule by Detective Delgado. (Record 53, at Dep. Ex. 9). This was because even though respondent made mention of the Mayor's office, he did not divulge the name of any specific complainant. (Id.). More specifically, informing an arrestee that the police knew of her drug activity from a complaint to the Mayor's office to get a confession is in conformity with Milwaukee Police Department policies and procedures so long as the identity of the person complaining to the Mayor's office is not divulged. (Record 50, at ¶¶ 5-11). As such, unlike the defendant Chief in Stanley, there is no undisputed basis for petitioner to claim that he lawfully ordered an unwanted and undesired transfer to Delgado.

Further, Jones complains the Stanley court reviewed other cases and the Seventh Circuit did not. Petitioner's argument ignores the Seventh Circuit reviewed the well-established law of the Seventh Circuit and under the facts and circumstances facing petitioner, no "public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule." Delgado, 282 F.3d at 521; (Pet. App. 19).

Petitioner's reliance on Kinney v. Weaver, 367 F.3d 337 (5th Cir. 2004) is also of no help to him. The petitioner relies on Kinney claiming the Fifth Circuit followed this Court's guidelines as set forth in Saucier and in Hope v. Pelzer, and that the Fifth Circuit took a general doctrine and applied it to a particular factual context of a lawsuit and found that based on the general principle, and the facts confronting the public official, the official was on notice that their conduct violated established law. However, petitioner's argument ignores the Seventh Circuit took the general principle that it had "determined that police protection and public safety are generally a matter of public concern", and that "it would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety." Delgado v. Jones, 282 F.3d at 517; (Pet. App. 12). In addition, the Seventh Circuit considered the general principle that, "It has been well established for many years in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights, including in particular retaliation through a transfer to a less desirable position." Id., at 520, *citing* Gustafson, 117 F.3d at 1020. (Pet. App. 17-18). From there, the Seventh Circuit considered the factual situation facing Jones and found that based on these general principles, as "a public official knowledgeable about relevant case law could not have reasonably believed he was free to retaliate by ordering an unwanted transfer to a less desirable job or by the manipulation of Delgado's vacation schedule." Id., at 521; (Pet. App. 19).

Likewise, petitioner's reliance upon Rivera-Jimenez v. Pierluisi, 362 F.3d 87 (1st Cir. 2004), actually cuts against him for the same reasons. A review of the Seventh Circuit's decision in Delgado only shows the Seventh Circuit applied

this Court's guidelines in evaluating qualified immunity. The fact petitioner does not like that decision does not entitle him to a review of his case by this court.

CONCLUSION

For all of the foregoing reasons, the respondent, Octavio Delgado, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

William R. Rettko
Counsel of Record
Rettko Law Offices, S.C.
15430 W. Capitol Drive, Suite 200
Brookfield, WI 53005
(262) 783-7200